Supreme Court
D.A. Term. A.D. 1858

Barker, Kimball)
and others (Appts
vs
Wm. Gerhard
and others. } Respts

Assignment of Errors
and Authorities for Appts

Now come the above named Appts
-ants before the Justices of the Supreme
Court of California at a term of
said Court begun and holden on the
third Monday of October A.D. 1858
say that in the record and proceed=
-ings in said Cause, and also in
the rendition of judgment therein
-and in the order denying the
motion for a new trial there is
manifest error -

And the said Appellants
here set forth, and specially assign
the following as the errors aforesaid

1. The Court below erred in
ruling out the deposition of Charles
B. Howe, as evidence at the trial
of said Cause.

2. The Court erred
in refusing to set aside the Verdict
in said Cause and grant a new trial

upon the following grounds -

1st Surprise

Which ordinary prudence on the part of the Plaintiffs could not have guarded against

2nd Insufficiency of the evidence to justify the verdict rendered by the jury

3rd Error in law occurring at the trial and duly excepted to by the plaintiffs

4th The verdict is contrary to law and evidence

3

The Court erred in refusing the instruction asked by Plaintiffs marked A & B & C and in giving those asked by defendants numbered from 1 to 11 inclusive

And for the errors aforesaid as well as for other errors in the said record and proceedings appearing the said Appellants pray this Court that the said judgment and order aforesaid may be reversed annulled and altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment and order and that a new trial be granted

McConnell & Miles
Of Counsel for Appellants

Authorities Cited for Appellants

Coke on Litt. 262 (a) — Bac. Ab. Title Condition - Vol 2. P. 316 — 1. Hilliard Law of Real Prop. P. 369 — 4. Kents Comm. PS 123 - 127 — Kelly vs Natoma Wa- Company - 6. Cal. R. P. 105 — Coryer Etals vs Weaver Etals. Ib. 548 — Simpson Etals vs Eddy Etals. 3. Ib. 249. — Irwin vs. Phillips - 5. Ib. 140 —

O'Keefe Etals vs Cunningham Etals 9. Cal. 588 — Bagley vs. Eaton 8. Ib. 159 S. C. 9. Ib. 430 — S. C. July Term 1858 —

Barnes vs. Stark - 4. Cal. Rep - 414
Vissers Abridgement - Title "relation"
Jackson vs McCall - 3. Cowens. P. 80.
Jackson vs Bull - 1. Johns. Cases - 81 —
Same vs. Raymond 1. Johns. Cases 85 (note)
Case vs De Coes - 3. Caines Cases - 262 —
Jackson vs. Bard - 4 Johns. Rep. 234 -
Heath vs Ross - 12 Johns. R. 140
3. Kents Comm. S. 448 - 449 - 450 —
Lawrence vs Ober - 3 Campbell 514 — Corning vs Gould - 16. Wendell 531 — Zeakle vs Nace - 2. Wharton Rep 123 — Crandall Etals vs Wood Etals 8. Cal. Rep. P. 136 — Partridge Etals vs Townsend Etals - July Term - 1858
Domats Civil Law Sec. 1030 - et. Seq.

McConnell & Niles —

(2194)

Supreme Court

Harlow Kimball
and others
Appellants
vs
Wm Gerhard Exr &c
Respdt

Assignment of
Errors.

Filed Oct 12 '58
Chas. S. Sampson
Clk
By Chas. S. Sampson
Dep Clk

Filed Nov 5th 58

In Supreme Court,

STATE OF CALIFORNIA.

HARLOW KIMBALL, *et. als.*—Appellants.

vs.

WILLIAM GEARHART, *et. als.*—Respondents.

APPELLANTS' BRIEF.

We ask the reversal of the judgment in this case, upon the following grounds, viz:—

I. The Court below erred in ruling out the deposition of Charles R. Howe, as evidence at the trial of said cause.

II. The Court erred in refusing to set aside the verdict of the jury in said cause, and grant a new trial upon the following grounds:

1st. Surprise, which ordinary prudence on the part of plaintiffs would not have guarded against.

2d. Insufficiency of the evidence to justify the verdict rendered by the jury.

3d. Error in law, occurring at the trial, and duly excepted to by the plaintiffs.

4th. The verdict is contrary to law and evidence.

III. The Court erred in refusing the instructions asked by plaintiffs, numbered 7, 8, and 9; and in giving those asked by defendants, numbered from 1 to 11, inclusive.

I.

The first point assigned for error, consists in the ruling out of the deposition of Charles R. Howe.

The reasons which induced this action of the Court were briefly as follows:—Our complaint originally claimed damages from some time in March, 1856. At the April Term of the Court for the year 1858, when this cause was tried, and the jury failed to find a verdict—we so amended our complaint as to relinquish all claim for damages "*previous to July the 18th* 1856." Howe testified at the trial in April. Before the next term of the Court, Howe left the State, and his deposition was taken.

At the trial in July last, it was ascertained by the conveyance from Howe to Harlow Kimball, which had been introduced in evidence at the trial in April, that he had only parted with his interest in the plaintiffs ditch so late as July the 19th, 1856; and upon this showing, as well as upon his answers when examined as to interest, contained in the first part of the deposition, the defendants objected to his deposition because of his alleged interest in the damages claimed, for a single day, viz:—July the 18th 1856.

The Court sustained the objection, and the plaintiffs excepted.

The complaint was again amended so as to remit all claim for damages during the entire month of July 1856. But the Court persisted in excluding the deposition. (See record p. p. 17–28, inclusive.)

The ground of the exclusion of the deposition, was the existence of Howe's alleged interest in the damages for the 18th of July 1856. It was said that the re-

cord in the present action might be evidence for or against him in any suit he might hereafter institute for such damages.

Now if we show that Howe had no such interest *after* the 19th day of July 1856 as is alleged, we exonerate his deposition from the objections urged against it, and demonstrate its admissibility. This is evident. And we shall use the same evidence to prove his want of interest, as was used by the defendants, to establish its existence, viz:—his preliminary examination as to interest, contained in the first part of the deposition.

This suit is an action on the case for the recovery of damages caused by the wrongful diversion of water, to the use of which the plaintiffs were entitled.

(See complaint p. 1. of record.)

The water right, or easement alleged to have been disturbed and injured, pertains to a certain ditch situate on the public land, called the "Yuba Ditch."

This ditch was projected in May 1854.

As shown by Howe's preliminary examination, Harlow Kimball and himself were the original projectors of such ditch.

The statement made by Howe, and relied on by defendants, is substantially as follows:—

In May 1854, Kimball and himself conceived the project of constructing the ditch mentioned in the complaint, to bring in the water of the North fork of the North Yuba river, and its tributaries, to Eureka and vicinity.

Howe had no pecuniary means nor credit, and Kimball assumed the burthen of advancing all the funds immediately necessary—with the understanding however, that Howe should hereafter advance his share of the cost and expenses—and that he should then have an interest commensurate with his advances.

In the meanwhile, Howe was to devote his time and labor to the construction of the ditch, &c.

The plan adopted by them is very common in our part of the State. Men frequently embark in the enterprise of ditching, and other enterprises, without the requisite funds—depending upon the future to raise them. As they do not know what share of the cost they will be able to advance, the extent of their interest remains unascertained until they do pay the money, when it becomes immediately fixed and determined.

This is exactly what Howe means by his repeated statements "that he never knew what was the extent of his interest in the enterprise."

Two years passed—the ditch was near its completion—and still Howe had not contributed a single cent towards its cost.

In the meanwhile, Kimball became deeply involved in debt to Johnson & Hickok for money and material advanced by them *upon his credit* towards the construction of the work.

It became absolutely necessary that Howe should comply with the condition of his arrangement with Kimball, and advance a part of the money—or that he should suffer his estate to be determined, and back out of the enterprise *in toto*. He chose the latter. Perhaps he had no option in the matter—for the only mode Kimball had of satisfying Johnson & Hickok, was by conveying to them a two-fifths interest in the ditch; and they refused to take such conveyance, while the bankrupt Howe was regarded as having any interest, however slight.

Howe therefore conveyed to Kimball on the 19th of July 1856, and on the same day Kimball conveyed to Johnson & Hickok two-fifths of the whole enterprise. The two transactions were in fact but parts of the same transaction, as Howe's evidence shows.

Howe, in his deed to Kimball, quit claimed to him *one half* of the whole work, because his interest *might* have amounted to a half had he complied with his original agreement, and advanced the necessary money.

Now mark the terms of this whole arrangment so far as Howe is concerned.

Although as a matter of form, a sum is named in the deed as a consideration, yet in point of fact, he received not a cent by way of consideration, properly so called. But from his own statement, it appears that the only advantage he derived from the transaction, was first, a release from all liability to Johnson & Hickok by reason of the indebtedness to them; and secondly, he was to receive from Kimball, and Johnson & Hickok, compensation for all the labor and care he had bestowed upon the work, *from its very commencement*, at the rate of seven dollars per day.

This last arrangement is conclusive upon the view taken by the parties themselves, of Howe's original interest. In fact, the entire transaction shows that the parties themselves, regarded Howe as never having had a vested estate or interest in the enterprise, and that the deed was taken from him merely as a matter of precaution.

Now the question recurs upon the nature of Howe's estate or interest, before the 19th July 1856—and what effect the transactions of that date had upon it.

In the first place, we admit that Howe had such an interest before the 19th of July 1856, as would disqualify him as a witness in any action *instituted before that date*. But that is a very different question from the one presented by the record.

It is evident that Howe occupied towards Kimball and the enterprise, one of the two following positions, viz: first, at the commencement of the ditch, he had an interest *in presenti*, subject to be defeated by a future contingency, viz: the non payment of his proportion of the cost.

Or secondly, he may be regarded as having at the beginning of the enterprise only an inchoate right, capable of ripening into a vested interest *in futuro*, upon the happening of a certain contingency, viz: the payment of his part of the cost.

We care not which of the two positions be assigned to him, as he is equally competent in either case. We may observe, however, that the nature of the property itself, strongly militates against the first named position.

Assuming the first hypothesis to be correct, we lay down this proposition;—upon the happening of the contingency upon which his estate depended, he became divested of such estate *retroactively*, and his title thereto, as well as all of its incidents became as if they had never existed.

In this respect, it resembles more nearly than anything else an estate upon condition, created by deed. It is true there was no deed in this case, but the parties originally stood in the same position towards the property, and there was a contract or agreement between them, the final execution of which depended upon a condition. One other point of difference is to be found in the fact that a deed conveying an estate in lands &c., operates upon property having a present existence—whereas, in our case the original agreement or understanding between Howe & Kimball, was to operate upon property to be created by their future joint efforts. But this difference evidently tends to establish the propriety of our attempt to apply the law of "estates upon condition" to cases like the present.

The rule in relation to estates upon condition is, that when the estate is divested by the failure of the grantee to perform the condition, it operates retroactively; and while the grantee, or feoffee on condition is supposed in law never to have had an estate—the grantor shall enter as of his old title, and shall be regarded as having been all along the owner of the property.

"Regularly it is true, that he that entereth for a condition broken, shall be seized in his first estate—or of that estate which he had at the time of the estate made upon condition." Coke on Litt. 202 (a.)

In almost the same words, the same rule is stated in Bacon's Abridgment, and the practical consequences of the rule are also mentioned.

"It is laid down as a rule, that he who enters for a condition broken, shall be in of the same estate he was before; and therefore shall avoid all mesne charges and incumbrances."

Bac. Abr. Title *Condition*, Vol. 2. p. 316.

One of our own standard works in land law, states the rule as follows:

"Entry for condition broken has the effect of entirely defeating the estate of the grantee, and restoring the grantor to the *same title* which he had before the conveyance was made. It constitutes a paramount claim, and operates by relation so as to avoid all intermediate incumbrances."

1. Hilliard on Real Property, p. 369.

Chancellor Kent, after showing the distinction between a condition in law or a limitation, which of itself defeats the estate without entry—and a condition in deed or ordinary condition, which though broken does not avoid the estate until the entry made, says:—"But when the grantor does enter for condition broken, he is in of his former estate."

4. Kents Com. § 123—127.

Before condition broken, the grantee is the actual owner of the property, and may in many respects treat it as such owner. Thus, he would be the proper party to bring an action for waste, trespass, or other injury either to the possession or freehold, committed before his estate determined—provided such action was also commenced during its existence. But suppose a stranger should commit waste upon land conveyed upon condition, before condition broken; and suppose before any action was instituted therefor, the estate became determined and divested by entry for condition broken; who then would be the proper party to sue? The grantor, of course—for he is in of his old estate; and by presumption of law, and according to the doctrine of *relation*, the estate has never been out of him. So far does the rule go, that even had the grantee on condition recovered damages of a stranger for waste, before the grantors entry, the grantor would probably have been entitled to an account of such damages.

Now apply the same rule to the case at bar.

Before the transactions of the 19th July 1856—which we regard as being tantamount to an entry for breach of condition—Howe could have joined in any action

brought to recover compensation for an injury to his interest in the ditch or easement. But the effect of those transactions, was to divest him not only of his present and future interest therein, but *retroactively* of his past estate likewise. He could then no more sustain an action for injuries committed before, than he could for injuries committed after that date. In contemplation of law, he never had any interest—but Kimball was the sole owner during the entire period; and as this form of action must necessarily be founded on title of ownership, Kimball, as owner in the legal sense, could alone sue for past injuries to the easement.

Had Howe actually sued some one for such injuries before the determination of his interest, and recovered judgment, according to the rule above stated, Kimball would probably have had a right to demand an account from him of the sum recovered.

We would here suggest—what seems sufficiently clear—that were a grantor who has entered, or who has a right to enter and evict a grantee for condition broken, to take a conveyance from his grantee of the same property through abundance of caution, he would still be in as of his old estate, and not through the grantee. He would be in in the *post*, and not in the *per*. The law would at once remit him to his original paramount title, and not drive him to hold through the vicious title of his grantee.

The foregoing is advanced upon the hypothesis that Howe had from the commencement, a vested estate in the property injured, subject to a future contingency.

But when we consider the peculiar nature of that species of property, as well as the situation of Howe in respect to it, as disclosed by his answers, we are led to the conclusion that he cannot be so regarded.

In one very essential respect, this species of property differs from all other kinds hitherto known to the law. That difference consists in this—that ditch property is created by the very acts which give title to it. We know of no other species of property (except mining claims) of which the same can be said.

It follows necessarily, that at the date of the original arrangment between Howe and Kimball, there was nothing *in esse* for either of them to own, and therefore neither could, at that time, have had a vested estate.

Again, ditch property itself is sub-divided into two distinct kinds or species of property—one of which is dependant upon the other. They are—first the ditch, canal, or flume—and secondly, the water right, privilege, or easement.

Either of these may be injured, and the owner may have a remedy for such injury, specially appropriate to the nature of the property, and the nature of the injury. If his ditch be cut or filled up, he may bring trespass, founded on his possession. If his water right be disturbed, he may bring case, founded on his title or property.

The court will bear in mind that the action before it is an action on the case for an injury to the easement of the plaintiffs. There is no averment or pretense of any injury having been committed to their ditch or other corporeal property. The gist of our action is the diversion of water which we had a right to divert, from its natural fountain or stream, thereby preventing a diversion of the same water by us.

The action is founded on the plaintiffs title, or upon their ownership of the incorporeal hereditament or easement.

To enable Howe, therefore, to maintain an action for such an injury after the 19th of July 1866, it is necessary that he should have been one of the owners, not only of the ditch, but of the water right or easement, before that period—and also, that his estate or interest should not have been retroactively divested. This is evident.

We reminded the Court, above, that the acts of acquisition of ditch property were identical with the acts of creation. To illustrate our meaning, we will put a case. A man conceives the idea of constructing a ditch to a stream on the public land. All will admit that his mere conception of the plan is neither *property*, nor *a right*, in any sense of the words. Suppose however, he proceeds to mark a place on the stream to build a dam, and to plant stakes, put up notices, &c. Now he may have some sort of *property* or *right*, founded on his labor in selecting a point for the dam, and placing the notices. But if he has, it is of the lowest kind. At least, he as yet, owns no *easement* or *water right*, such as we say has been injured by defendants. Suppose again, he proceeds in due season to dig a part of the ditch—not sufficient however to divert and obtain control of the water. Now we say he *owns* the part so dug, but he still has no *water right or easement*. If at this stage he should sell his enterprise, and his purchaser should complete it, and obtain control of the water by actual diversion and appropriation, he (the vendor) would not be regarded in law as ever having had a vested title in the easement. His purchaser's right would, by the doctrine of "relation," extend back to, and date from the first act of the entire series which resulted in appropriating the water. But his own right would never be construed to include aught else than the mere corporeal and tangible result of his labor. Thus, in this case, if Howe

sold his share before the completion of the ditch and appropriation—then, even if his share had been fixed and definite from the first, it would not be regarded as extending to the easement, but merely to the part of the ditch completed at the date of the sale.

These principles are so obvious and so fully sustained by reason, that we deem it unnecessary to quote authority in support of them.

We content ourselves with a general reference to the following cases.

Kelly vs. The Natoma Water Co. (6. Cal. rep. 105.)
Couger et als. vs. Weaver et als. ibid 548.
Simpson vs. Eddy, 3. Cal. rep. p. 249.
Irwin vs. Phillips, 5. Cal. rep. 140.

But it will be asked—how does all this affect the case at bar, since the complaint itself shows that plaintiffs appropriation was prior in date to the 19th July 1856, when Howe sold to Kimball?

As a matter of fact, it may be doubtful whether the plaintiff did actually appropriate the water of Sebastapol Spring before Howe quit-claimed to Kimball. But we suppose we are bound by our complaint in this matter, and are willing to be.

In answer then to the question, we say, that taking into consideration the nature of the property, in connection with the facts disclosed by Howe's evidence, we fully establish the correctness of our position, that Howe never had a legal estate in the property, but a mere right, which might at some future time ripen into an estate.

For, granting that we are right in the assumption that neither Kimball or Howe had a vested estate in the easement until actual diversion, and granting further the truth of Howe's statement that the extent of his share was to depend on his future contributions, the following conclusions seem to follow inevitably, viz: Upon the completion of the ditch and the diversion of the water, the *water right* became vested in the projectors jointly—or rather, perhaps, as tenants in common, in proportion to the amount advanced by each.

Inasmuch, however, as Howe had advanced nothing, no share vested in him; so that on the 19th July 1856, he had no interest in the ditch or easement, and of course could not demand of defendants to make amends for the damages.

It will be perceived that our reasoning altogether pretermits the fact that Howe worked on the ditch from its first commencement, till its completion. The reason for this is two fold. 1st. Because we infer from Howe's statement, that the contribution of each of the adventurers was to be in money or its equivalent in materials. The very object of this contribution of each of the adventurers was to employ laborers.

2d. Because he was compensated for his labor in a way entirely inconsistent with the idea of his receiving a share of the ditch for it, viz: by receiving seven dollars per day for it, for the whole time he was engaged. By accepting this sum as compensation for all his rights, Howe estopped himself from saying either to his co-adventurers or to a mere stranger, that he ever had an interest, or that he was entitled to recover damages from them for any act done either before or after such acceptance.

Upon this reasoning we think it clear that the deposition ought to have been admitted in evidence, and that his Honor erred in excluding it.

II.

The Court erred in refusing to set aside the verdict and order a new trial.

This motion was predicated on several grounds, the principal of which were "that the verdict was contrary to evidence,"—and "error in law occurrring at the trial, and excepted to by the plaintiffs."

The last of these two grounds is based upon the action of the Court in refusing certain instructions of the plaintiffs, and in giving others of the defendants. These very properly come up for argument under our third assignment of error, and we will therefore defer the discussion of them untill we come to argue that; and will confine ourselves at present to the evidence in the case.

We contend that the verdict was contrary to the evidence.

We are aware of the great unwillingness of the Court in ordinary cases, to inter-

fere with the verdict of a jury, or with the action of a *Nisi Prius* Court in sustaining such verdict. Nothing, in our opinion, can be more laudable than this spirit, in an appellate Court.

But cases must often arise, and we know have arisen in our State, where the ends of justice imperitively demand the exercise of this Court's undoubted prerogative to supervise the verdicts of juries, and set them aside, if in conflict with testimony.

O'Keefe vs. Cunningham (9. Cal. rep. p. 589.)
Bagley vs. Eaton, 8. ibid 159.—9. ibid 430.
Same case, July Term, 1858.

The case at bar, we think is one of these cases.

It is fortunate for us, that in this case, there is no real conflict of evidence upon the main point involved.

The question before the the jury was really nothing more than a question of priority; though the question of abandonment, was, improperly as we think, forced upon the attention of the jury.

For the present, we will confine ourselves to a statement of the evidence of the location and appropriation by the plaintiffs and defendants—and the evidence of plaintiffs abandonment of their rights—leaving the question whether defendants could avail themselves of such abandonment, until we come to discuss the instructions given and refused by the Court.

The evidence of the plaintiffs location is as follows:

In May 1854, the plaintiff Harlow Kimball, and one Charles R. Howe, conceived the idea of constructing the ditch afterwards known as the Yuba Ditch, to receive the waters of one of the forks of the north fork of the Yuba river, and all intervening streams and tributaries.

There was a ditch known as the "Kimball Ditch" in existance at that date, but it was a very different thing from the ditch contemplated by Kimball & Howe.

The first step taken was to make a reconnoisance, or preliminary survey of the country, to ascertain the feasibility of their project. This was in May or June of 1854. On the first day of July 1854, Howe, who was the active man in all preparatory matters, put up a number of notices from a point called the "gap of the Saddle Back mountain," to a point above the so called "Sebastapol Spring," the waters of which are now in controversy. The notices in fact extended as far up as Sebastapol Canon or creek—one of the tributaries of the North fork of the Yuba, a distance of over two miles. A copy of this notice, in accordance with the usage of ditch projectors in the mining region, was filed in the County Recorder's office, and actually recorded—the better to preserve the evidence of its contents.

See notice, p. 59, record—Ev. of Webb Nicholson p. 60 ib.

In addition to the putting up of notices, &c., stakes were planted, trees blazed, and such other indicia of the location of a ditch made, as were practicable under the circumstances.

(See evidence of W. B. Mack, p. 61 record—of James Dudley, p. 74 ibid—of Michael Young, p. 73 ib—of N. Mullen, p. 78 ib—of J. R. McFarland, p. 76 of record.)

The evidence shows that the face of the country from the gap of the Saddle Back onward, was exceedingly rough, difficult of access, and almost impervious to the footsteps of the explorer. Indeed, until the enterprise and labor of these plaintiffs had opened up a pathway to the region traversed by them, it had been a *terra incognita* to all other persons. The very names by which points there are now known, were then unheard of, and indeed were not bestowed until sometime in 1855. We trust that the usual destiny of explorers does not await our clients; though if the judgment of the jury who tried this cause be final, our case will form no exception to the bad luck which has attended discoverers, from the time of Columbus to that of Capt. Sutter, and Marshall the gold finder.

As soon as they had sufficiently fixed and marked the line of the ditch—that is to say, about the last of June or first of July 1854—Kimball & Howe commenced the actual construction of the ditch.

(See evidence of Witnesses S. C.)

They employed from the first as many as ten or twelve hands, and in a few days completed the excavation of a piece of ditch between a quarter and a half mile in length. But in the course of a week or ten days, Howe, who acted as superintendent, by passing over the ground, and making a more accurate and careful inspection of the route than he had been able to do before, ascertained that the line they were then at work upon would not, if allowed sufficient grade, take in the very spring now in dispute. But here occurred a difficulty. The line they were then

at work upon, would cross the gap of the Saddle Back upon the surface of the ground; while by dropping down enough to take in the spring, the necessity would be imposed upon them of cutting a tunnel through the ridge, in order to connect the proposed ditch with the country below, which it was intended to supply with water.

A tunnel is a costly work, and Howe, not wishing to incur the responsibility of so extensive a change, left his work, and went to Eureka, to see and consult with his co-adventurer, Kimball. Kimball's consent to the change having been obtained, Howe returned in due season to the scene of operations, and the proposed change of line was at once made. This was about the middle of July 1854.

(See Evidence of W. B. Mack.)

After forsaking the old or upper line, Howe, with another person, immediately began a survey of the lower line. New notices—copies of the old notices, were put up. New stakes were set wherever the dense chapparal would permit it. The brush was cut in many places, and a number of trees were blazed. As soon as the route was settled by these preliminary steps, the laborers were set to digging, while Howe as surveyor, went before them and graded the line for them to dig by. The tunnel was also surveyed, and the two extremities fixed by means of stakes, &c.

They continued to work, until in August 1854, when the men employed were compelled to go below to work on the "Kimball Ditch" with which the "Yuba Ditch" was intended to connect, and which needed repairs. About one half mile was completed on the lower grade before they ceased operations for that year.

The evidence shows that about eight hundred dollars were expended for labor on the proposed ditch, during the summer of 1854.

We have been thus particular in restating the evidence of the first operations of the plaintiffs in 1854, for the reason that fault is found by defendants counsel with such proceedings, and the plaintiffs are charged in respect to them, with a want of due diligence.

We would only add in this connexion, that the line made by the plaintiffs was frequently observed, and easily recognized by a number of persons who passed along during the fall and winter of 1854. It was so plain as to be mistaken for a new road.

(See ev. of McFarland, p. 76—of Johnson, p. 80—of defendants witness Cowen, p. 88—of McFadden, record.)

During all of this period, and until April or May of 1855, no one but the plaintiffs had ever dreamed of appropriating the water of the spring, and no one had even located for mining purposes. The large masses of snow which usually encumber that part of the country, from early fall, until late in the spring, was a sufficient reason why no one was found adventurous enough to make his appearance there in the winter. But the truth is that until the plaintiffs had by their energy opened the way, and set the example, no one had ever conceived the idea of going to so desolate a region, either to mine for gold, or to dig ditches.

Early in the Spring of 1855, the plaintiffs returned to their work, and continued their operations until late in the fall of that year, at which time they were driven out by the snow. In August of that year they commenced the actual construction of the tunnel through the ridge. The work on the tunnel was continued through the winter until it was completed, which was about February 1856.

The Evidence shows that about *eight* [redacted] *dollars* were expended during the year 1855, in the further construction of the ditch, and that it was so far completed as to be ready to take the particular water in dispute, whenever the tunnel should be finished.

Thousand

Although the tunnel was finished by the month of February 1856, it was not in a condition to receive and carry water before March of the same year; at which date plaintiffs were actually prepared to divert the Sebastapol water, and did divert it for a brief period, and until prevented by the defendants.

On the other hand, it is not pretended that the defendants made any location or claim, either to the water in dispute, or to the mining claims in the working of which they used such water, before April or May of 1855.

At that time, having located their mining ground on Sebastapol Flat, they appropriated the entire volume of water from Sebastapol Spring, for the purpose of working such claims.

The foregoing are the principal facts disclosed by the statement, and we have no hesitation in asserting that they stand entirely uncontradicted.

Some evidence was introduced by the defence, it is true, to rebut some of the

particular facts or evidence of the plaintiffs, but it does not touch the ground work and foundation of plaintiffs case.

For instance; evidence was given to show that certain marks or hacks on trees were made in 1855, instead of 1854. But at the same time the defence seemed to admit the principal fact, that the plaintiffs did locate and work on their ditch in 1854. It follows then, that whether the hacks were made in 1855 or in 1854, cannot materially affect plaintiffs case—since the question was, not when the trees were blazed—but when the ditch was located.

In addition to the foregoing facts, we would remark, that the evidence shows that the quantity of water furnished by the stream in dispute, was from twenty-four to thirty inches, miner's measure.

This, although called a *spring*, is a large volume of water; and in a region where water sells for seventy-five cents or a dollar per inch, is of considerable value to its owners.

To enable this court to understand fully the position of the ditch and country, the evidence before the jury, and the arguments of Counsel—the maps used at the trial by the respective parties, are by agreement made a part of the record on appeal.

Upon the foregoing detail of the testimony, we ask—where is the evidence to justify the verdict of the jury in favor of the defendants?

Will any one say that we did not take the necessary steps to ascertain the line of our ditch, and notify the world of our claim?

Let him compare the acts of the plaintiffs with those of the defendant Weaver, in the case of Couger et. als. vs Weaver et als., which were held by this Court to be sufficient to constitute a valid water right. (6 Cal. rep. p. 548.)

We deem the proof of our prior appropriation to be conclusive; and inasmuch as it is not really contradicted, we see no way for this Court to escape the conclusion that the verdict is against evidence.

The answer admits the adverse appropriation of the defendants, and therefore there can be no pretext for saying that the jury found as they did because of the absence of proof of damages. Besides, plaintiffs evidence upon the question of damage, is as conclusive as it is upon the question of appropriation.

It was pretended at the trial, we admit, that the plaintiffs had not used due diligence in following up their first location by actual appropriation. In other words that plaintiffs had abandoned their location.

The question of *abandonment* belongs more properly to our discussion of the instructions offered by the plaintiffs. But we will here suggest that the evidence shows a greater degree of diligence than is usual in such cases—and there is not a scintilla of proof either of an actual abandonment by the plaintiffs, or of that sort of involuntary abandonment which is sometimes implied from long continued non user.

No proof of abandonment was offered by the defence; and the fact that the plaintiffs actually completed a large portion of their ditch within a comparatively brief period, is a full and conclusive answer to the inference which is sought to be drawn from the case.

III.

The Court erred in refusing instructions numbered 7, 8 and 9, offered by plaintiffs, and in giving the instructions numbered from 1 to 11 inclusive, offered by the defendants.

See record p. 97. (plaintiffs instructions.)
Ibid p. 98, (defendants instructions.)

The instructions refused by the Court are as follows, viz :—

"7th. If the plaintiffs did, in the summer of 1854, acquire any right to the water now in dispute, then the law presumes they retained the right so by them acquired, and the burthen of proving an abandoment on their part, is with the [redacted]" Defendants"

"8th. That the defendants are confined to the defence set up in their answer, and cannot rely on matters not pleaded by them to defeat this action, and therefore, if defendants in their answer rely exclusively upon priority of location and appropriation as a defence to plaintiffs action, they must now be confined to such defence."

"9th. If the defendants rely on an abandonment by the plaintiffs, they must aver it in their answer, and establish it by their proof."

It would be somewhat difficult to ascertain his Honor's objections to these instructions, had he not himself informed us.

As regards the first, (No. 7,) he objects that it is not predicated upon the evidence—as it was not shown that the plaintiffs acquired any right to the disputed water in 1854.

His objection to our position that *abandonment* is a special defence and must be specially pleaded, is that we should have objected to the introduction of any proof of abandonment if it was not warranted by the pleadings, &c. He then proceeds to remark that he fully explained the doctrine of *relation* to the jury, &c.

Now it seems to us that it is upon this very doctrine of relation that we differ from the learned Judge. He says there is no proof that we acquired any rights, &c. in 1854. But we say that according to the very doctrine of *relation* mentioned by him—if we commenced our operations to divert the Sebastapol water in 1854, and completed them in 1856—our acquisition of the easement relates back and dates from the year 1854. That is to say, by construction of law, we are supposed, as against all subsequent intruders, to have acquired our right in that year.

Kelly vs. The Natoma Water Co., (6 Cal. rep. p. 105.)
Barnes vs. Stark, (4. Cal. rep. p. 414.)

In this last case, Mr. Justice Wells expressly adopts the language of the Court below, that "where a number of acts are to be performed by virtue of which a right accrues, the time of performance of the last act relates back to the commencement of the series of acts which create the right, so as to make it (the right) perfect when the first act was being commenced."

See also, Viners Abr. Title *Relation*,
Jackson vs. McCall, (3. Cowen, rep. p. 80.)
Jackson vs. Bull, (1. Johns. Cas. p. 81.)
Jackson vs. Raymond, (ibid. p. 85 note.)
Case vs. DeGoes, (3. Caines Cas. p. 262.)
Jackson vs. Bard, (4. Johns. rep. p. 234.)

In Heath vs. Boss, a patent for land dated the 4th of December, but which did not pass the great seal until the 28th, was held to relate back so as to vest the title in the patentee from the date.

12. Johns. rep. p. 140.

The authorities are quite numerous, but the above will suffice.

If we did commence in 1854, then our title is supposed to have vested, or to have been acquired at that time. Possibly the difference between the District Judge and ourselves is a purely verbal one; but an instruction, otherwise legal and proper, ought not to be refused beaause of a mere verbal objection.

But we cannot help thinking that his Honor misconceived the law of *relation*, and that the entire explanation which he states he gave to the jury, was erroneous.

The true import of the doctrine of *relation* being established, no one will deny the legal propriety of the instruction. It merely reiterates the well known rule, that the existence of a right being shown, its continuance will be presumed—and that the burthen of disproving its present existence is with those who deny it.

The other point of difference between the Court and ourselves, is upon a mere question of fact. He says we ought to have objected to the defendants evidence of the plaintiffs abandonment; thereby implying that evidence was offered by the defendants expressly to prove abandonment.

Now, as a matter of fact, no such evidence was offered.

All the evidence offered by the defendants was admissible in some point of view. No evidence was offered avowedly for the purpose of showing an abandonment.

What we objected to, was the attempt of the defendants to infer from the general circumstances and history of the case, abandonment by the plaintiffs, and to impress such inference upon the jury. In our 9th instruction we distinctly affirm that the defendants must plead an abandonment by the plaintiffs and *prove* it; which we would scarcely have said, had the defendants actually introduced such proof. Our point was, that the defendants were trying to avail themselves of an abandonment on our part, without having pleaded or proved it.

Instructions are frequently asked for no other purpose, than to refute the erroneous position of counsel, when it is apprehended that their error may be imposed upon the minds of the jury. And our instruction could be sustained upon this ground, if on no other.

All these instructions are, beyond doubt, correct. *Abandonment*, like *forfeiture*, is a special defense and must be pleaded. Especially is this true of that sort of abandonment which takes place against the will of the party. It then assumes many of the distinctive features, and all of the consequences of forfeiture.

An abandonment, properly so called, can only be voluntary. But there are cases where a *non user* for a given period, will be regarded as tantamount to the expression of a determination to abandon. It is this latter sort of abandonment which bears so striking a resemblance to a forfeiture. For in ninty-nine out of every one hundred instances of abandonment by *non user*, the will does not in fact consent.

3. Kent's Com § 448, 449, 450.

All authorities concur in holding that a right can only be lost by non user, where the non user extends over a period sufficient to vest a title by prescription.

Domat's Civil Law § 1030. 3. Kent's Com. § 448.
Lawrence vs. Obee (3, Campbell 514.)
Corning vs. Gould, (16. Wend. 513.)
Yeakle vs. Nace, (2. Wharton's rep. 123.)

The same principle has been applied by this Court to water privileges on the public lands, and to mining claims.

Crandall vs. Woods, (8. Cal. rep. 136.)
Partridge vs. Townsend et als. July Term 1858.

The latter case is exactly in point.

The Civil Law in this respect agrees literally with ours. Indeed it seems to be taken for granted, that our law of easements and servitudes was derived from the Roman Law.

Domat's Civil Law § 1030 *et seq.*

The principle has often been applied to offices, and other franchises.

From the various reported cases, the following rule of proceedure may be adduced: When a man holds a right or franchise of a public nature, and it is alleged that he has abandoned it by *non user*, the fact can only be definitely ascertained and adjudged by a judicial proceeding in which the question is directly involved.

Hardin vs. Page, (8. B Monroe, 648.)

In this case the principle is applied to public offices.

The Alabama and New Hampshire reports also abound in similar cases, but not having the books we cannot make more particular references.

In the case of private rights or easements acquired by location or prescription, if a party seeks to show an abandonment by continued non user, he must plead it, whether he is party plaintiff or defendant.

We may here remark that the principle for which we contend, is generally applicable to all cases where a right once vested, is sought to be divested because of the failure of the party to do something required by law. The defences of the Statutes of Frauds and limitations are familiar examples of our meaning.

We would remark in conclusion, that there was not the slightest evidence before the jury of any *non user* by the plaintiffs. The case of Partridge vs. Townsend, cited above, is a conclusive authority upon this point.

We presume the jury must have been carried away by some such idea; but if so, they acted without evidence, and their action should be rectified.

McCONNELL & NILES,
And H. I. THORNTON, Jr.
Of Counsel with Appellants.

In Supreme Court,

STATE OF CALIFORNIA.

HARLOW KIMBALL, *et. als.*—Appellants.

vs.

WILLIAM GEARHART, *et. als.*—Respondents.

APPELLANTS' BRIEF.

McCONNELL & NILES, And H. I. THORNTON, Jr.
Of Counsel with Appellants.

Filed Nov 6 58

In Supreme Court,

STATE OF CALIFORNIA.

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vs.

WILLIAM GEARHART, *et. als.*—Respondents.

APPELLANTS' BRIEF.

We ask the reversal of the judgment in this case, upon the following grounds, viz:—

I. The Court below erred in ruling out the deposition of Charles R. Howe, as evidence at the trial of said cause.

II. The Court erred in refusing to set aside the verdict of the jury in said cause, and grant a new trial upon the following grounds:

1st. Surprise, which ordinary prudence on the part of plaintiffs would not have guarded against.

2d. Insufficiency of the evidence to justify the verdict rendered by the jury.

3d. Error in law, occurring at the trial, and duly excepted to by the plaintiffs.

4th. The verdict is contrary to law and evidence.

III. The Court erred in refusing the instructions asked by plaintiffs, numbered 7, 8, and 9; and in giving those asked by defendants, numbered from 1 to 11, inclusive.

I.

The first point assigned for error, consists in the ruling out of the deposition of Charles R. Howe.

The reasons which induced this action of the Court were briefly as follows:—Our complaint originally claimed damages from some time in March, 1856. At the April Term of the Court for the year 1858, when this cause was tried, and the jury failed to find a verdict—we so amended our complaint as to relinquish all claim for damages "*previous to July the 18th* 1856." Howe testified at the trial in April. Before the next term of the Court, Howe left the State, and his deposition was taken.

At the trial in July last, it was ascertained by the conveyance from Howe to Harlow Kimball, which had been introduced in evidence at the trial in April, that he had only parted with his interest in the plaintiffs ditch so late as July the 19th, 1856; and upon this showing, as well as upon his answers when examined as to interest, contained in the first part of the deposition, the defendants objected to his deposition because of his alleged interest in the damages claimed, for a single day, viz:—July the 18th 1856.

The Court sustained the objection, and the plaintiffs excepted.

The complaint was again amended so as to remit all claim for damages during the entire month of July 1856. But the Court persisted in excluding the deposition. (See record p. p. 17–28, inclusive.)

The ground of the exclusion of the deposition, was the existence of Howe's alleged interest in the damages for the 18th of July 1856. It was said that the re-

cord in the present action might be evidence for or against him in any suit he might hereafter institute for such damages.

Now if we show that Howe had no such interest *after* the 19th day of July 1856 as is alleged, we exonerate his deposition from the objections urged against it, and demonstrate its admissibility. This is evident. And we shall use the same evidence to prove his want of interest, as was used by the defendants, to establish its existence, viz:—his preliminary examination as to interest, contained in the first part of the deposition.

This suit is an action on the case for the recovery of damages caused by the wrongful diversion of water, to the use of which the plaintiffs were entitled.

(See complaint p. 1. of record.)

The water right, or easement alleged to have been disturbed and injured, pertains to a certain ditch situate on the public land, called the "Yuba Ditch."

This ditch was projected in May 1854.

As shown by Howe's preliminary examination, Harlow Kimball and himself were the original projectors of such ditch.

The statement made by Howe, and relied on by defendants, is substantially as follows:—

In May 1854, Kimball and himself conceived the project of constructing the ditch mentioned in the complaint, to bring in the water of the North fork of the North Yuba river, and its tributaries, to Eureka and vicinity.

Howe had no pecuniary means nor credit, and Kimball assumed the burthen of advancing all the funds immediately necessary—with the understanding however, that Howe should hereafter advance his share of the cost and expenses—and that he should then have an interest commensurate with his advances.

In the meanwhile, Howe was to devote his time and labor to the construction of the ditch, &c.

The plan adopted by them is very common in our part of the State. Men frequently embark in the enterprise of ditching, and other enterprises, without the requisite funds—depending upon the future to raise them. As they do not know what share of the cost they will be able to advance, the extent of their interest remains unascertained until they do pay the money, when it becomes immediately fixed and determined.

This is exactly what Howe means by his repeated statements "that he never knew what was the extent of his interest in the enterprise."

Two years passed—the ditch was near its completion—and still Howe had not contributed a single cent towards its cost.

In the meanwhile, Kimball became deeply involved in debt to Johnson & Hickok for money and material advanced by them *upon his credit* towards the construction of the work.

It became absolutely necessary that Howe should comply with the condition of his arrangement with Kimball, and advance a part of the money—or that he should suffer his estate to be determined, and back out of the enterprise *in toto*. He chose the latter. Perhaps he had no option in the matter—for the only mode Kimball had of satisfying Johnson & Hickok, was by conveying to them a two-fifths interest in the ditch; and they refused to take such conveyance, while the bankrupt Howe was regarded as having any interest, however slight.

Howe therefore conveyed to Kimball on the 19th of July 1856, and on the same day Kimball conveyed to Johnson & Hickok two-fifths of the whole enterprise. The two transactions were in fact but parts of the same transaction, as Howe's evidence shows.

Howe, in his deed to Kimball, quit claimed to him *one half* of the whole work, because his interest *might* have amounted to a half had he complied with his original agreement, and advanced the necessary money.

Now mark the terms of this whole arrangment so far as Howe is concerned.

Although as a matter of form, a sum is named in the deed as a consideration, yet in point of fact, he received not a cent by way of consideration, properly so called. But from his own statement, it appears that the only advantage he derived from the transaction, was first, a release from all liability to Johnson & Hickok by reason of the indebtedness to them; and secondly, he was to receive from Kimball, and Johnson & Hickok, compensation for all the labor and care he had bestowed upon the work, *from its very commencement*, at the rate of seven dollars per day.

This last arrangement is conclusive upon the view taken by the parties themselves, of Howe's original interest. In fact, the entire transaction shows that the parties themselves, regarded Howe as never having had a vested estate or interest in the enterprise, and that the deed was taken from him merely as a matter of precaution.

Now the question recurs upon the nature of Howe's estate or interest, before the 19th July 1856—and what effect the transactions of that date had upon it.

In the first place, we admit that Howe had such an interest before the 19th of July 1856, as would disqualify him as a witness in any action *instituted before that date.* But that is a very different question from the one presented by the record.

It is evident that Howe occupied towards Kimball and the enterprise, one of the two following positions, viz: first, at the commencement of the ditch, he had an interest *in presenti*, subject to be defeated by a future contingency, viz: the non payment of his proportion of the cost.

Or secondly, he may be regarded as having at the beginning of the enterprise only an inchoate right, capable of ripening into a vested interest *in futuro*, upon the happening of a certain contingency, viz: the payment of his part of the cost.

We care not which of the two positions be assigned to him, as he is equally competent in either case. We may observe, however, that the nature of the property itself, strongly militates against the first named position.

Assuming the first hypothesis to be correct, we lay down this proposition;—upon the happening of the contingency upon which his estate depended, he became divested of such estate *retroactively*, and his title thereto, as well as all of its incidents became as if they had never existed.

In this respect, it resembles more nearly than anything else an estate upon condition, created by deed. It is true there was no deed in this case, but the parties originally stood in the same position towards the property, and there was a contract or agreement between them, the final execution of which depended upon a condition. One other point of difference is to be found in the fact that a deed conveying an estate in lands &c., operates upon property having a present existence—whereas, in our case the original agreement or understanding between Howe & Kimball, was to operate upon property to be created by their future joint efforts. But this difference evidently tends to establish the propriety of our attempt to apply the law of "estates upon condition" to cases like the present.

The rule in relation to estates upon condition is, that when the estate is divested by the failure of the grantee to perform the condition, it operates retroactively; and while the grantee, or feoffee on condition is supposed in law never to have had an estate—the grantor shall enter as of his old title, and shall be regarded as having been all along the owner of the property.

"Regularly it is true, that he that entereth for a condition broken, shall be seized in his first estate—or of that estate which he had at the time of the estate made upon condition." Coke on Litt. 202 (a.)

In almost the same words, the same rule is stated in Bacon's Abridgment, and the practical consequences of the rule are also mentioned.

"It is laid down as a rule, that he who enters for a condition broken, shall be in of the same estate he was before; and therefore shall avoid all mesne charges and incumbrances."

Bac. Abr. Title *Condition*, Vol. 2. p. 316.

One of our own standard works in land law, states the rule as follows:

"Entry for condition broken has the effect of entirely defeating the estate of the grantee, and restoring the grantor to the *same title* which he had before the conveyance was made. It constitutes a paramount claim, and operates by relation so as to avoid all intermediate incumbrances."

1. Hilliard on Real Property, p. 369.

Chancellor Kent, after showing the distinction between a condition in law or a limitation, which of itself defeats the estate without entry—and a condition in deed or ordinary condition, which though broken does not avoid the estate until the entry made, says:—"But when the grantor does enter for condition broken, he is in of his former estate."

4. Kents Com. § 123—127.

Before condition broken, the grantee is the actual owner of the property, and may in many respects treat it as such owner. Thus, he would be the proper party to bring an action for waste, trespass, or other injury either to the possession or freehold, committed before his estate determined—provided such action was also commenced during its existence. But suppose a stranger should commit waste upon land conveyed upon condition, before condition broken; and suppose before any action was instituted therefor, the estate became determined and divested by entry for condition broken; who then would be the proper party to sue? The grantor, of course—for he is in of his old estate; and by presumption of law, and according to the doctrine of *relation;* the estate has never been out of him. So far does the rule go, that even had the grantee on condition recovered damages of a stranger for waste, before the grantors entry, the grantor would probably have been entitled to an account of such damages.

Now apply the same rule to the case at bar.

Before the transactions of the 19th July 1856—which we regard as being tantamount to an entry for breach of condition—Howe could have joined in any action

brought to recover compensation for an injury to his interest in the ditch or easement. But the effect of those transactions, was to divest him not only of his present and future interest therein, but *retroactively* of his past estate likewise. He could then no more sustain an action for injuries committed before, than he could for injuries committed after that date. In contemplation of law, he never had any interest—but Kimball was the sole owner during the entire period; and as this form of action must necessarily be founded on title of ownership, Kimball, as owner in the legal sense, could alone sue for past injuries to the easement.

Had Howe actually sued some one for such injuries before the determination of his interest, and recovered judgment, according to the rule above stated, Kimball would probably have had a right to demand an account from him of the sum recovered.

We would here suggest—what seems sufficiently clear—that were a grantor who has entered, or who has a right to enter and evict a grantee for condition broken, to take a conveyance from his grantee of the same property through abundance of caution, he would still be in as of his old estate, and not through the grantee. He would be in in the *post*, and not in the *per*. The law would at once remit him to his original paramount title, and not drive him to hold through the vicious title of his grantee.

The foregoing is advanced upon the hypothesis that Howe had from the commencement, a vested estate in the property injured, subject to a future contingency.

But when we consider the peculiar nature of that species of property, as well as the situation of Howe in respect to it, as disclosed by his answers, we are led to the conclusion that he cannot be so regarded.

In one very essential respect, this species of property differs from all other kinds hitherto known to the law. That difference consists in this—that ditch property is created by the very acts which give title to it. We know of no other species of property (except mining claims) of which the same can be said.

It follows necessarily, that at the date of the original arrangment between Howe and Kimball, there was nothing *in esse* for either of them to own, and therefore neither could, at that time, have had a vested estate.

Again, ditch property itself is sub-divided into two distinct kinds or species of property—one of which is dependant upon the other. They are—first the ditch, canal, or flume—and secondly, the water right, privilege, or easement.

Either of these may be injured, and the owner may have a remedy for such injury, specially appropriate to the nature of the property, and the nature of the injury. If his ditch be cut or filled up, he may bring trespass, founded on his possession. If his water right be disturbed, he may bring case, founded on his title or property.

The court will bear in mind that the action before it is an action on the case for an injury to the easement of the plaintiffs. There is no averment or pretense of any injury having been committed to their ditch or other corporeal property. The gist of our action is the diversion of water which we had a right to divert, from its natural fountain or stream, thereby preventing a diversion of the same water by us.

The action is founded on the plaintiffs title, or upon their ownership of the incorporeal hereditament or easement.

To enable Howe, therefore, to maintain an action for such an injury after the 19th of July 1856, it is necessary that he should have been one of the owners, not only of the ditch, but of the water right or easement, before that period—and also, that his estate or interest should not have been retroactively divested. This is evident.

We reminded the Court, above, that the acts of acquisition of ditch property were identical with the acts of creation. To illustrate our meaning, we will put a case. A man conceives the idea of constructing a ditch to a stream on the public land. All will admit that his mere conception of the plan is neither *property*, nor *a right*, in any sense of the words. Suppose however, he proceeds to mark a place on the stream to build a dam, and to plant stakes, put up notices, &c. Now he may have some sort of *property* or *right*, founded on his labor in selecting a point for the dam, and placing the notices. But if he has, it is of the lowest kind. At least, he as yet, owns no *easement* or *water right*, such as we say has been injured by defendants. Suppose again, he proceeds in due season to dig a part of the ditch—not sufficient however to divert and obtain control of the water. Now we say he *owns* the part so dug, but he still has no *water right or easement*. If at this stage he should sell his enterprise, and his purchaser should complete it, and obtain control of the water by actual diversion and appropriation, he (the vendor) would not be regarded in law as ever having had a vested title in the easement. His purchaser's right would, by the doctrine of "relation," extend back to, and date from the first act of the entire series which resulted in appropriating the water. But his own right would never be construed to include aught else than the mere corporeal and tangible result of his labor. Thus, in this case, if Howe

sold his share before the completion of the ditch and appropriation—then, even if his share had been fixed and definite from the first, it would not be regarded as extending to the easement, but merely to the part of the ditch completed at the date of the sale.

These principles are so obvious and so fully sustained by reason, that we deem it unnecessary to quote authority in support of them.

We content ourselves with a general reference to the following cases.

Kelly vs. The Natoma Water Co. (6. Cal. rep. 105.)
Couger et als. vs. Weaver et als. ibid 548.
Simpson vs. Eddy, 8. Cal. rep. p. 249.
Irwin vs. Phillips, 5. Cal. rep. 140.

But it will be asked—how does all this affect the case at bar, since the complaint itself shows that plaintiffs appropriation was prior in date to the 19th July 1856, when Howe sold to Kimball?

As a matter of fact, it may be doubtful whether the plaintiff did actually appropriate the water of Sebastapol Spring before Howe quit-claimed to Kimball. But we suppose we are bound by our complaint in this matter, and are willing to be.

In answer then to the question, we say, that taking into consideration the nature of the property, in connection with the facts disclosed by Howe's evidence, we fully establish the correctness of our position, that Howe never had a legal estate in the property, but a mere right, which might at some future time ripen into an estate.

For, granting that we are right in the assumption that neither Kimball or Howe had a vested estate in the easement until actual diversion, and granting further the truth of Howe's statement that the extent of his share was to depend on his future contributions, the following conclusions seem to follow inevitably, viz: Upon the completion of the ditch and the diversion of the water, the *water right* became vested in the projectors jointly—or rather, perhaps, as tenants in common, in proportion to the amount advanced by each.

Inasmuch, however, as Howe had advanced nothing, no share vested in him; so that on the 19th July 1856, he had no interest in the ditch or easement, and of course could not demand of defendants to make amends for the damages.

It will be perceived that our reasoning altogether pretermits the fact that Howe worked on the ditch from its first commencement, till its completion. The reason for this is two fold. 1st. Because we infer from Howe's statement, that the contribution of each of the adventurers was to be in money or its equivalent in materials. The very object of this contribution of each of the adventurers was to employ laborers.

2d. Because he was compensated for his labor in a way entirely inconsistent with the idea of his receiving a share of the ditch for it, viz: by receiving seven dollars per day for it, for the whole time he was engaged. By accepting this sum as compensation for all his rights, Howe estopped himself from saying either to his co-adventurers or to a mere stranger, that he ever had an interest, or that he was entitled to recover damages from them for any act done either before or after such acceptance.

Upon this reasoning we think it clear that the deposition ought to have been admitted in evidence, and that his Honor erred in excluding it.

II.

The Court erred in refusing to set aside the verdict and order a new trial.

This motion was predicated on several grounds, the principal of which were "that the verdict was contrary to evidence,"—and "error in law occurring at the trial, and excepted to by the plaintiffs."

The last of these two grounds is based upon the action of the Court in refusing certain instructions of the plaintiffs, and in giving others of the defendants. These very properly come up for argument under our third assignment of error, and we will therefore defer the discussion of them untill we come to argue that; and will confine ourselves at present to the evidence in the case.

We contend that the verdict was contrary to the evidence.

We are aware of the great unwillingness of the Court in ordinary cases, to inter-

fere with the verdict of a jury, or with the action of a *Nisi Prius* Court in sustaining such verdict. Nothing, in our opinion, can be more laudable than this spirit, in an appellate Court.

But cases must often arise, and we know have arisen in our State, where the ends of justice imperitively demand the exercise of this Court's undoubted prerogative to supervise the verdicts of juries, and set them aside, if in conflict with testimony.

O'Keefe vs. Cunningham (9. Cal. rep. p. 589.)
Bagley vs. Eaton, 8. ibid 159.—9. ibid 430.
Same case, July Term, 1858.

The case at bar, we think is one of these cases.

It is fortunate for us, that in this case, there is no real conflict of evidence upon the main point involved.

The question before the the jury was really nothing more than a question of priority; though the question of abandonment, was, improperly as we think, forced upon the attention of the jury.

For the present, we will confine ourselves to a statement of the evidence of the location and appropriation by the plaintiffs and defendants—and the evidence of plaintiffs abandonment of their rights—leaving the question whether defendants could avail themselves of such abandonment, until we come to discuss the instructions given and refused by the Court.

The evidence of the plaintiffs location is as follows:

In May 1854, the plaintiff Harlow Kimball, and one Charles R. Howe, conceived the idea of constructing the ditch afterwards known as the Yuba Ditch, to receive the waters of one of the forks of the north fork of the Yuba river, and all intervening streams and tributaries.

There was a ditch known as the "Kimball Ditch" in existance at that date, but it was a very different thing from the ditch contemplated by Kimball & Howe.

The first step taken was to make a reconnoisance, or preliminary survey of the country, to ascertain the feasibility of their project. This was in May or June of 1854. On the first day of July 1854, Howe, who was the active man in all preparatory matters, put up a number of notices from a point called the "gap of the Saddle Back mountain," to a point above the so called "Sebastapol Spring," the waters of which are now in controversy. The notices in fact extended as far up as Sebastapol Canon or creek—one of the tributaries of the North fork of the Yuba, a distance of over two miles. A copy of this notice, in accordance with the usage of ditch projectors in the mining region, was filed in the County Recorder's office, and actually recorded—the better to preserve the evidence of its contents.

See notice, p. 59, record—Ev. of Webb Nicholson p. 60 ib.

In addition to to the putting up of notices, &c., stakes were planted, trees blazed and such other indicia of the location of a ditch made, as were practicable under the circumstances.

(See evidence of W. B. Mack, p. 61 record—of James Dudley, p. 74 ibid—of Michael Young, p. 73 ib—of N. Mullen, p. 78 ib—of J. R. McFarland, p. 76 of record.)

The evidence shows that the face of the country from the gap of the Saddle Back onward, was exceedingly rough, difficult of access, and almost impervious to the footsteps of the explorer. Indeed, until the enterprise and labor of these plaintiffs had opened up a pathway to the region traversed by them, it had been a *terra incognita* to all other persons. The very names by which points there are now known, were then unheard of, and indeed were not bestowed until sometime in 1855. We trust that the usual destiny of explorers does not await our clients; though if the judgment of the jury who tried this cause be final, our case will form no exception to the bad luck which has attended discoverers, from the time of Columbus to that of Capt. Sutter, and Marshall the gold finder.

As soon as they had sufficiently fixed and marked the line of the ditch—that is to say, about the last of June or first of July 1854—Kimball & Howe commenced the actual construction of the ditch.

(See evidence of Witnesses S. C.)

They employed from the first as many as ten or twelve hands, and in a few days completed the excavation of a piece of ditch between a quarter and a half mile in length. But in the course of a week or ten days, Howe, who acted as superintendent, by passing over the ground, and making a more accurate and careful inspection of the route than he had been able to do before, ascertained that the line they were then at work upon would not, if allowed sufficient grade, take in the very spring now in dispute. But here occurred a difficulty. The line they were then

at work upon, would cross the gap of the Saddle Back upon the surface of the ground; while by dropping down enough to take in the spring, the necessity would be imposed upon them of cutting a tunnel through the ridge, in order to connect the proposed ditch with the country below, which it was intended to supply with water.

A tunnel is a costly work, and Howe, not wishing to incur the responsibility of so extensive a change, left his work, and went to Eureka, to see and consult with his co-adventurer, Kimball. Kimball's consent to the change having been obtained, Howe returned in due season to the scene of operations, and the proposed change of line was at once made. This was about the middle of July 1854.

(See Evidence of W. B. Mack.)

After forsaking the old or upper line, Howe, with another person, immediately began a survey of the lower line. New notices—copies of the old notices, were put up. New stakes were set wherever the dense chapparal would permit it. The brush was cut in many places, and a number of trees were blazed. As soon as the route was settled by these preliminary steps, the laborers were set to digging, while Howe as surveyor, went before them and graded the line for them to dig by. The tunnel was also surveyed, and the two extremities fixed by means of stakes, &c.

They continued to work, until in August 1854, when the men employed were compelled to go below to work on the "Kimball Ditch" with which the "Yuba Ditch" was intended to connect, and which needed repairs. About one half mile was completed on the lower grade before they ceased operations for that year.

The evidence shows that about eight hundred dollars were expended for labor on the proposed ditch, during the summer of 1854.

We have been thus particular in restating the evidence of the first operations of the plaintiffs in 1854, for the reason that fault is found by defendants counsel with such proceedings, and the plaintiffs are charged in respect to them, with a want of due diligence.

We would only add in this connexion, that the line made by the plaintiffs was frequently observed, and easily recognized by a number of persons who passed along during the fall and winter of 1854. It was so plain as to be mistaken for a new road.

(See ev. of McFarland, p. 76—of Johnson, p. 80—of defendants witness Cowen, p. 88—of McFadden, record.)

During all of this period, and until April or May of 1855, no one but the plaintiffs had ever dreamed of appropriating the water of the spring, and no one had even located for mining purposes. The large masses of snow which usually encumber that part of the country, from early fall, until late in the spring, was a sufficient reason why no one was found adventurous enough to make his appearance there in the winter. But the truth is that until the plaintiffs had by their energy opened the way, and set the example, no one had ever conceived the idea of going to so desolate a region, either to mine for gold, or to dig ditches.

Early in the Spring of 1855, the plaintiffs returned to their work, and continued their operations until late in the fall of that year, at which time they were driven out by the snow. In August of that year they commenced the actual construction of the tunnel through the ridge. The work on the tunnel was continued through the winter until it was completed, which was about February 1856.

The Evidence shows that about *eight* [redacted] *dollars* were expended during the year 1855, in the further construction of the ditch, and that it was so far completed as to be ready to take the particular water in dispute, whenever the tunnel should be finished. *Thousand*

Although the tunnel was finished by the month of February 1856, it was not in a condition to receive and carry water before March of the same year; at which date plaintiffs were actually prepared to divert the Sebastapol water, and did divert it for a brief period, and until prevented by the defendants.

On the other hand, it is not pretended that the defendants made any location or claim, either to the water in dispute, or to the mining claims in the working of which they used such water, before April or May of 1855.

At that time, having located their mining ground on Sebastapol Flat, they appropriated the entire volume of water from Sebastapol Spring, for the purpose of working such claims.

The foregoing are the principal facts disclosed by the statement, and we have no hesitation in asserting that they stand entirely uncontradicted.

Some evidence was introduced by the defence, it is true, to rebut some of the

particular facts or evidence of the plaintiffs, but it does not touch the ground work and foundation of plaintiffs case.

For instance; evidence was given to show that certain marks or hacks on trees were made in 1855, instead of 1854. But at the same time the defence seemed to admit the principal fact, that the plaintiffs did locate and work on their ditch in 1854. It follows then, that whether the hacks were made in 1855 or in 1854, cannot materially affect plaintiffs case—since the question was, not when the trees were blazed—but when the ditch was located.

In addition to the foregoing facts, we would remark, that the evidence shows that the quantity of water furnished by the stream in dispute, was from twenty-four to thirty inches, miner's measure.

This, although called a *spring*, is a large volume of water; and in a region where water sells for seventy-five cents or a dollar per inch, is of considerable value to its owners.

To enable this court to understand fully the position of the ditch and country, the evidence before the jury, and the arguments of Counsel—the maps used at the trial by the respective parties, are by agreement made a part of the record on appeal.

Upon the foregoing detail of the testimony, we ask—where is the evidence to justify the verdict of the jury in favor of the defendants?

Will any one say that we did not take the necessary steps to ascertain the line of our ditch, and notify the world of our claim?

Let him compare the acts of the plaintiffs with those of the defendant Weaver, in the case of Couger et. als. vs Weaver et als., which were held by this Court to be sufficient to constitute a valid water right. (6 Cal. rep. p. 548.)

We deem the proof of our prior appropriation to be conclusive; and inasmuch as it is not really contradicted, we see no way for this Court to escape the conclusion that the verdict is against evidence.

The answer admits the adverse appropriation of the defendants, and therefore there can be no pretext for saying that the jury found as they did because of the absence of proof of damages. Besides, plaintiffs evidence upon the question of damage, is as conclusive as it is upon the question of appropriation.

It was pretended at the trial, we admit, that the plaintiffs had not used due diligence in following up their first location by actual appropriation. In other words that plaintiffs had abandoned their location.

The question of *abandonment* belongs more properly to our discussion of the instructions offered by the plaintiffs. But we will here suggest that the evidence shows a greater degree of diligence than is usual in such cases—and there is not a scintilla of proof either of an actual abandonment by the plaintiffs, or of that sort of involuntary abandonment which is sometimes implied from long continued non user.

No proof of abandonment was offered by the defence; and the fact that the plaintiffs actually completed a large portion of their ditch within a comparatively brief period, is a full and conclusive answer to the inference which is sought to be drawn from the case.

III.

The Court erred in refusing instructions numbered 7, 8 and 9, offered by plaintiffs, and in giving the instructions numbered from 1 to 11 inclusive, offered by the defendants.

See record p. 97. (plaintiffs instructions.)
Ibid p. 98, (defendants instructions.)

The instructions refused by the Court are as follows, viz:—

"7th. If the plaintiffs did, in the summer of 1854, acquire any right to the water now in dispute, then the law presumes they retained the right so by them acquired, and the burthen of proving an abandoment on their part, is with the ~~plaintiffs~~ Defendants."

"8th. That the defendants are confined to the defence set up in their answer, and cannot rely on matters not pleaded by them to defeat this action, and therefore, if defendants in their answer rely exclusively upon priority of location and appropriation as a defence to plaintiffs action, they must now be confined to such defence."

"9th. If the defendants rely on an abandonment by the plaintiffs, they must aver it in their answer, and establish it by their proof."

It would be somewhat difficult to ascertain his Honor's objections to these instructions, had he not himself informed us.

As regards the first, (No. 7,) he objects that it is not predicated upon the evidence—as it was not shown that the plaintiffs acquired any right to the disputed water in 1854.

His objection to our position that *abandonment* is a special defence and must be specially pleaded, is that we should have objected to the introduction of any proof of abandonment if it was not warranted by the pleadings, &c. He then proceeds to remark that he fully explained the doctrine of *relation* to the jury, &c.

Now it seems to us that it is upon this very doctrine of relation that we differ from the learned Judge. He says there is no proof that we acquired any rights, &c. in 1854. But we say that according to the very doctrine of *relation* mentioned by him—if we commenced our operations to divert the Sebastapol water in 1854, and completed them in 1856—our acquisition of the easement relates back and dates from the year 1854. That is to say, by construction of law, we are supposed, as against all subsequent intruders, to have acquired our right in that year.

Kelly vs. The Natoma Water Co., (6 Cal. rep. p. 105.)
Barnes vs. Stark, (4. Cal. rep. p. 414.)

In this last case, Mr. Justice Wells expressly adopts the language of the Court below, that "where a number of acts are to be performed by virtue of which a right accrues, the time of performance of the last act relates back to the commencement of the series of acts which create the right, so as to make it (the right) perfect when the first act was being commenced."

See also, Viners Abr. Title *Relation*.
Jackson vs. McCall, (3. Cowen, rep. p. 80.)
Jackson vs. Bull, (1. Johns. Cas. p. 81.)
Jackson vs. Raymond, (ibid. p. 85 note.)
Case vs. DeGoes, (3. Caines Cas. p. 262.)
Jackson vs. Bard, (4. Johns. rep. p. 234.)

In Heath vs. Boss, a patent for land dated the 4th of December, but which did not pass the great seal until the 28th, was held to relate back so as to vest the title in the patentee from the date.

12. Johns. rep. p. 140.

The authorities are quite numerous, but the above will suffice.

If we did commence in 1854, then our title is supposed to have vested, or to have been acquired at that time. Possibly the difference between the District Judge and ourselves is a purely verbal one; but an instruction, otherwise legal and proper, ought not to be refused beaause of a mere verbal objection.

But we cannot help thinking that his Honor misconceived the law of *relation*, and that the entire explanation which he states he gave to the jury, was erroneous.

The true import of the doctrine of *relation* being established, no one will deny the legal propriety of the instruction. It merely reiterates the well known rule, that the existence of a right being shown, its continuance will be presumed—and that the burthen of disproving its present existence is with those who deny it.

The other point of difference between the Court and ourselves, is upon a mere question of fact. He says we ought to have objected to the defendants evidence of the plaintiffs abandonment; thereby implying that evidence was offered by the defendants expressly to prove abandonment.

Now, as a matter of fact, no such evidence was offered.

All the evidence offered by the defendants was admissible in some point of view. No evidence was offered avowedly for the purpose of showing an abandonment.

What we objected to, was the attempt of the defendants to infer from the general circumstances and history of the case, abandonment by the plaintiffs, and to impress such inference upon the jury. In our 9th instruction we distinctly affirm that the defendants must plead an abandonment by the plaintiffs and *prove* it; which we would scarcely have said, had the defendants actually introduced such proof. Our point was, that the defendants were trying to avail themselves of an abandonment on our part, without having pleaded or proved it.

Instructions are frequently asked for no other purpose, than to refute the erroneous position of counsel, when it is apprehended that their error may be imposed upon the minds of the jury. And our instruction could be sustained upon this ground, if on no other.

All these instructions are, beyond doubt, correct. *Abandonment*, like *forfeitures*, is a special defense and must be pleaded. Especially is this true of that sort of abandonment which takes place against the will of the party. It then assumes many of the distinctive features, and all of the consequences of forfeiture.

An abandonment, properly so called, can only be voluntary. But there are cases where a *non user* for a given period, will be regarded as tantamount to the expression of a determination to abandon. It is this latter sort of abandonment which bears so striking a resemblance to a forfeiture. For in ninty-nine out of every one hundred instances of abandonment by *non user*, the will does not in fact consent.

3. Kent's Com § 448, 449, 450.

All authorities concur in holding that a right can only be lost by non user, where the non user extends over a period sufficient to vest a title by prescription.

Domat's Civil Law § 1030. 3. Kent's Com. § 448.
Lawrence vs. Obee (3. Campbell 514.)
Corning vs. Gould, (16. Wend. 513.)
Yeakle vs. Nace, (2. Wharton's rep. 123.)

The same principle has been applied by this Court to water privileges on the public lands, and to mining claims.

Crandall vs. Woods, (8. Cal. rep. 136.)
Partridge vs. Townsend et als. July Term 1858.

The latter case is exactly in point.

The Civil Law in this respect agrees literally with ours. Indeed it seems to be taken for granted, that our law of easements and servitudes was derived from the Roman Law.

Domat's Civil Law § 1030 *et seq.*

The principle has often been applied to offices, and other franchises.

From the various reported cases, the following rule of procedure may be adduced:

When a man holds a right or franchise of a public nature, and it is alleged that he has abandoned it by *non user*, the fact can only be definitely ascertained and adjudged by a judicial proceeding in which the question is directly involved.

Hardin vs. Page, (8. B Monroe, 648.)

In this case the principle is applied to public offices.

The Alabama and New Hampshire reports also abound in similar cases, but not having the books we cannot make more particular references.

In the case of private rights or easements acquired by location or prescription, if a party seeks to show an abandonment by continued non user, he must plead it, whether he is party plaintiff or defendant.

We may here remark that the principle for which we contend, is generally applicable to all cases where a right once vested, is sought to be divested because of the failure of the party to do something required by law. The defences of the Statutes of Frauds and limitations are familiar examples of our meaning.

We would remark in conclusion, that there was not the slightest evidence before the jury of any *non user* by the plaintiffs. The case of Partridge vs. Townsend, cited above, is a conclusive authority upon this point.

We presume the jury must have been carried away by some such idea; but if so, they acted without evidence, and their action should be rectified.

McCONNELL & NILES,
And H. I. THORNTON, Jr.
Of Counsel with Appellants.

In Supreme Court,

STATE OF CALIFORNIA.

HARLOW KIMBALL, *et. als.*—Appellants.

vs.

WILLIAM GEARHART, *et. als.*—Respondents.

APPELLANTS' BRIEF.

McCONNELL & NILES, And H. I. THORNTON, Jr.
Of Counsel with Appellants.

Supreme Court. Oct Term A.D. 1858.

Harlow Kimball and others } Appellants
vs
Wm Gerhart and others } Respondents

Assignment of Errors & Authorities for Appellants.

Now come the above named appellants before the Justices of the Supreme Court of California at a term of said Court begun & holden on the third Monday of October A.D. 1858 and say that in the record & proceedings in said cause, and also in a rendition of judgment therein and in the order overruling the motion for a new trial, there is manifest error.

And the said Appellants here set forth and specially assign the following as the errors aforesaid.

1. The Court below erred in ruling out the deposition of Charles B. Howe, as evidence at the trial of said cause.

2. The Court erred in refusing to set aside the verdict in said cause, and grant a new trial upon the following grounds.

2.

1st Surprise, which ordinary prudence on the part of the Plffs could not have guarded against.
2d Insufficiency of the evidence to justify rendered by the Jury.
3d Error in law occurring at the trial and duly excepted to by the Plffs
4th The verdict is contrary to law and evidence

3

The Court erred in refusing the instructions asked by Plaintiffs numbered 7. 8. 9. — and in giving those asked by defendants 1 to 11 Inclusive

And for the errors aforesaid, as well as for other errors in the said record & proceedings appearing, the said Appellants pray this Court that the said Judgment & order refusing a new trial, be reversed, annulled & altogether held for nothing, and that they may be restored to all things which they have lost by occasion of the said judgment & order — and that a new trial be granted

McConnell & Niles
of Counsel for Appellants

3.

Authorities cited for Appellants
Coke on Litt. 202 (a) - Bac. Ab. Title "Condition" - Vol 2 - p 316. 1 Hilliard Law of real Prop. p. 369. 4 Kents Comm P. 123.-127-
Kelly vs The Natoma W. Company 6 Cal R. p 105.
Conger et al. vs Weaver et al. ib. 548.
Simpson et al vs Eddy et al. 3 ib 249
Irwin vs Phillips 5 ib 140.
O'Keefe Vol vs Cunningham et al. 9 Cal 589.
Bagley vs Eaton 8 ib 159. S.C. 9 ib 430.
S.C. - July Term 1858.
Barnes vs Sterke - 4 Cal Rep. 414.
Viners Abridgement title "relation."
Jackson vs McCall 3 Cowen p 80.
Jackson vs Bull 1 Johns Cases 81
Same vs Raymond 1 Johns Cases 85 (note)
Case vs De Goes 3 Caines cases 262.
Jackson vs Barr 4 Johns Rep 234.
Heath vs Ross 12 Johns 140.
3 Kents Comm P 448. 449. 450
Lawrence vs Ober 3 Campbell 514.
Corning vs Gould 16 Wendell 531.
Yeakle vs Nace 2 Wharton 123.
Crandall et al vs Wood et al 8 Cal R 136.
Partridge et al vs vs Townsend et al. July T. 1858.
Domats Civil Law Sec 1030 et seq.

McConnell & Niles

Supreme Court Oct. Term 1858

Warren Kimball and others } Appellants
vs
Wm. Gerhart and others } Respondents

Assignment of Errors and Authorities for Appellants.

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& grant a new trial upon the follow=
=ing grounds

1st Surprise, which ordin=
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2d Insufficiency of the evidence to
justify the verdict, rendered by
the Jury.

3d Error in law occurring at the
trial and duly excepted to by the
plaintiffs.

4th The verdict is contrary to law
& evidence

3d

The Court erred in refusing the
instructions asked by Plaintiffs numbered
1, 8, & 9, and in giving those asked by
defendants numbered from 1 to 11 inclu=
=sive

And for the errors aforesaid as well
as for other errors in the record and
proceedings appearing the said Appellants
pray this Court that the said judgment
and order refusing a new trial, be reversed,
annulled and altogether held for nothing
and that they may be restored to all
things which they have lost by occasion
of the said judgment & order & that a new
trial be granted.

McConnell & Niles
of Counsel for Appellants.

3 Authorities cited for Appellants.

Coke upon Litt. 202 (a) – Bac Ab Title Condition – Vol 2. p 316 – 1. Hilliard Law of Real Property p 369. 4 Kents Comm. S 123 – 127 – Kelly vs Natoma W Company 6 Cal R. p 105. – Conger et als vs Weaver et als Ib. 548. Simpson et al vs Eddy et al 3 Ib 249. Irwin vs Phillips 5 Ib 140. – O'Keefe et al vs Cunningham et als 9 Cal 589 – Bagley vs Eaton 8 Ib 159 – S. C. 9 Ib 430 – S. C. July Term 1858

Barnes vs Stark – 4. Cal. Rep – 414.

Viners abridgment Title "relation"

Jackson vs McCall 3 Cowens page 80

Jackson vs Bull 1 Johns (Cases) 81

— Same vs Raymond 1 Johns cases 85 (note)

Case vs De Goes 3 Caines Cases 262.

— Jackson vs Barr – 4 Johns Rep 234

Heath vs Ross 12 Johns R 140

— 3. Kents Comm S 448. 449. 450.

Lawrence vs Ober 3 Campbell 514.

Corning vs Gold 16 Wendell 531.

Yeakle vs Nace 2 Wharton Rep 123.

Crandal et al vs Wood et al 8 Cal Rep p 136

Partridge et al vs Townsend et al July Term 1858.

Domats Civil Law Bo 1030 et seq

McConnel & Niles

Filed Nov 5th 58

In Supreme Court,

STATE OF CALIFORNIA.

HARLOW KIMBALL, *et. als.*—Appellants.

vs.

WILLIAM GEARHART, *et. als.*—Respondents.

APPELLANTS' BRIEF.

We ask the reversal of the judgment in this case, upon the following grounds, viz:—

I. The Court below erred in ruling out the deposition of Charles R. Howe, as evidence at the trial of said cause.

II. The Court erred in refusing to set aside the verdict of the jury in said cause, and grant a new trial upon the following grounds:

1st. Surprise, which ordinary prudence on the part of plaintiffs would not have guarded against.

2d. Insufficiency of the evidence to justify the verdict rendered by the jury.

3d. Error in law, occurring at the trial, and duly excepted to by the plaintiffs.

4th. The verdict is contrary to law and evidence.

III. The Court erred in refusing the instructions asked by plaintiffs, numbered 7, 8, and 9; and in giving those asked by defendants, numbered from 1 to 11, inclusive.

I.

The first point assigned for error, consists in the ruling out of the deposition of Charles R. Howe.

The reasons which induced this action of the Court were briefly as follows:—Our complaint originally claimed damages from some time in March, 1856. At the April Term of the Court for the year 1858, when this cause was tried, and the jury failed to find a verdict—we so amended our complaint as to relinquish all claim for damages "*previous to July the 18th* 1856." Howe testified at the trial in April. Before the next term of the Court, Howe left the State, and his deposition was taken.

At the trial in July last, it was ascertained by the conveyance from Howe to Harlow Kimball, which had been introduced in evidence at the trial in April, that he had only parted with his interest in the plaintiffs ditch so late as July the 19th, 1856; and upon this showing, as well as upon his answers when examined as to interest, contained in the first part of the deposition, the defendants objected to his deposition because of his alleged interest in the damages claimed, for a single day, viz:—July the 18th 1856.

The Court sustained the objection, and the plaintiffs excepted.

The complaint was again amended so as to remit all claim for damages during the entire month of July 1856. But the Court persisted in excluding the deposition. (See record p. p. 17–28, inclusive.)

The ground of the exclusion of the deposition, was the existence of Howe's alleged interest in the damages for the 18th of July 1856. It was said that the re-

cord in the present action might be evidence for or against him in any suit he might hereafter institute for such damages.

Now if we show that Howe had no such interest *after* the 19th day of July 1856 as is alleged, we exonerate his deposition from the objections urged against it, and demonstrate its admissibility. This is evident. And we shall use the same evidence to prove his want of interest, as was used by the defendants, to establish its existence, viz:—his preliminary examination as to interest, contained in the first part of the deposition.

This suit is an action on the case for the recovery of damages caused by the wrongful diversion of water, to the use of which the plaintiffs were entitled.

(See complaint p. 1. of record.)

The water right, or easement alleged to have been disturbed and injured, pertains to a certain ditch situate on the public land, called the "Yuba Ditch."

This ditch was projected in May 1854.

As shown by Howe's preliminary examination, Harlow Kimball and himself were the original projectors of such ditch.

The statement made by Howe, and relied on by defendants, is substantially as follows:—

In May 1854, Kimball and himself conceived the project of constructing the ditch mentioned in the complaint, to bring in the water of the North fork of the North Yuba river, and its tributaries, to Eureka and vicinity.

Howe had no pecuniary means nor credit, and Kimball assumed the burthen of advancing all the funds immediately necessary—with the understanding however, that Howe should hereafter advance his share of the cost and expenses—and that he should then have an interest commensurate with his advances.

In the meanwhile, Howe was to devote his time and labor to the construction of the ditch, &c.

The plan adopted by them is very common in our part of the State. Men frequently embark in the enterprise of ditching, and other enterprises, without the requisite funds—depending upon the future to raise them. As they do not know what share of the cost they will be able to advance, the extent of their interest remains unascertained until they do pay the money, when it becomes immediately fixed and determined.

This is exactly what Howe means by his repeated statements "that he never knew what was the extent of his interest in the enterprise."

Two years passed—the ditch was near its completion—and still Howe had not contributed a single cent towards its cost.

In the meanwhile, Kimball became deeply involved in debt to Johnson & Hickok for money and material advanced by them *upon his credit* towards the construction of the work.

It became absolutely necessary that Howe should comply with the condition of his arrangement with Kimball, and advance a part of the money—or that he should suffer his estate to be determined, and back out of the enterprise *in toto*. He chose the latter. Perhaps he had no option in the matter—for the only mode Kimball had of satisfying Johnson & Hickok, was by conveying to them a two-fifths interest in the ditch; and they refused to take such conveyance, while the bankrupt Howe was regarded as having any interest, however slight.

Howe therefore conveyed to Kimball on the 19th of July 1856, and on the same day Kimball conveyed to Johnson & Hickok two-fifths of the whole enterprise. The two transactions were in fact but parts of the same transaction, as Howe's evidence shows.

Howe, in his deed to Kimball, quit claimed to him *one half* of the whole work, because his interest *might* have amounted to a half had he complied with his original agreement, and advanced the necessary money.

Now mark the terms of this whole arrangment so far as Howe is concerned.

Although as a matter of form, a sum is named in the deed as a consideration, yet in point of fact, he received not a cent by way of consideration, properly so called. But from his own statement, it appears that the only advantage he derived from the transaction, was first, a release from all liability to Johnson & Hickok by reason of the indebtedness to them; and secondly, he was to receive from Kimball, and Johnson & Hickok, compensation for all the labor and care he had bestowed upon the work, *from its very commencement*, at the rate of seven dollars per day.

This last arrangement is conclusive upon the view taken by the parties themselves, of Howe's original interest. In fact, the entire transaction shows that the parties themselves, regarded Howe as never having had a vested estate or interest in the enterprise, and that the deed was taken from him merely as a matter of precaution.

Now the question recurs upon the nature of Howe's estate or interest, before the 19th July 1856—and what effect the transactions of that date had upon it.

In the first place, we admit that Howe had such an interest before the 19th of July 1856, as would disqualify him as a witness in any action *instituted before that date.* But that is a very different question from the one presented by the record.

It is evident that Howe occupied towards Kimball and the enterprise, one of the two following positions, viz: first, at the commencement of the ditch, he had an interest *in presenti*, subject to be defeated by a future contingency, viz: the non payment of his proportion of the cost.

Or secondly, he may be regarded as having at the beginning of the enterprise only an inchoate right, capable of ripening into a vested interest *in futuro*, upon the happening of a certain contingency, viz: the payment of his part of the cost.

We care not which of the two positions be assigned to him, as he is equally competent in either case. We may observe, however, that the nature of the property itself, strongly militates against the first named position.

Assuming the first hypothesis to be correct, we lay down this proposition;—upon the happening of the contingency upon which his estate depended, he became divested of such estate *retroactively*, and his title thereto, as well as all of its incidents became as if they had never existed.

In this respect, it resembles more nearly than anything else an estate upon condition, created by deed. It is true there was no deed in this case, but the parties originally stood in the same position towards the property, and there was a contract or agreement between them, the final execution of which depended upon a condition. One other point of difference is to be found in the fact that a deed conveying an estate in lands &c., operates upon property having a present existence—whereas, in our case the original agreement or understanding between Howe & Kimball, was to operate upon property to be created by their future joint efforts. But this difference evidently tends to establish the propriety of our attempt to apply the law of "estates upon condition" to cases like the present.

The rule in relation to estates upon condition is, that when the estate is divested by the failure of the grantee to perform the condition, it operates retroactively; and while the grantee, or feoffee on condition is supposed in law never to have had an estate—the grantor shall enter as of his old title, and shall be regarded as having been all along the owner of the property.

"Regularly it is true, that he that entereth for a condition broken, shall be seized in his first estate—or of that estate which he had at the time of the estate made upon condition." Coke on Litt. 202 (a.)

In almost the same words, the same rule is stated in Bacon's Abridgment, and the practical consequences of the rule are also mentioned.

"It is laid down as a rule, that he who enters for a condition broken, shall be in of the same estate he was before; and therefore shall avoid all mesne charges and incumbrances."

Bac. Abr. Title *Condition*, Vol. 2. p. 316.

One of our own standard works in land law, states the rule as follows:

"Entry for condition broken has the effect of entirely defeating the estate of the grantee, and restoring the grantor to the *same title* which he had before the conveyance was made. It constitutes a paramount claim, and operates by relation so as to avoid all intermediate incumbrances."

1. Hilliard on Real Property, p. 369.

Chancellor Kent, after showing the distinction between a condition in law or a limitation, which of itself defeats the estate without entry—and a condition in deed or ordinary condition, which though broken does not avoid the estate until the entry made, says:—"But when the grantor does enter for condition broken, he is in of his former estate."

4. Kents Com. § 123—127.

Before condition broken, the grantee is the actual owner of the property, and may in many respects treat it as such owner. Thus, he would be the proper party to bring an action for waste, trespass, or other injury either to the possession or freehold, committed before his estate determined—provided such action was also commenced during its existence. But suppose a stranger should commit waste upon land conveyed upon condition, before condition broken; and suppose before any action was instituted therefor, the estate became determined and divested by entry for condition broken; who then would be the proper party to sue? The grantor, of course—for he is in of his old estate; and by presumption of law, and according to the doctrine of *relation*, the estate has never been out of him. So far does the rule go, that even had the grantee on condition recovered damages of a stranger for waste, before the grantors entry, the grantor would probably have been entitled to an account of such damages.

Now apply the same rule to the case at bar.

Before the transactions of the 19th July 1856—which we regard as being tantamount to an entry for breach of condition—Howe could have joined in any action

brought to recover compensation for an injury to his interest in the ditch or easement. But the effect of those transactions, was to divest him not only of his present and future interest therein, but *retroactively* of his past estate likewise. He could then no more sustain an action for injuries committed before, than he could for injuries committed after that date. In contemplation of law, he never had any interest—but Kimball was the sole owner during the entire period; and as this form of action must necessarily be founded on title of ownership, Kimball, as owner in the legal sense, could alone sue for past injuries to the easement.

Had Howe actually sued some one for such injuries before the determination of his interest, and recovered judgment, according to the rule above stated, Kimball would probably have had a right to demand an account from him of the sum recovered.

We would here suggest—what seems sufficiently clear—that were a grantor who has entered, or who has a right to enter and evict a grantee for condition broken, to take a conveyance from his grantee of the same property through abundance of caution, he would still be in as of his old estate, and not through the grantee. He would be in in the *post*, and not in the *per*. The law would at once remit him to his original paramount title, and not drive him to hold through the vicious title of his grantee.

The foregoing is advanced upon the hypothesis that Howe had from the commencement, a vested estate in the property injured, subject to a future contingency.

But when we consider the peculiar nature of that species of property, as well as the situation of Howe in respect to it, as disclosed by his answers, we are led to the conclusion that he cannot be so regarded.

In one very essential respect, this species of property differs from all other kinds hitherto known to the law. That difference consists in this—that ditch property is created by the very acts which give title to it. We know of no other species of property (except mining claims) of which the same can be said.

It follows necessarily, that at the date of the original arrangment between Howe and Kimball, there was nothing *in esse* for either of them to own, and therefore neither could, at that time, have had a vested estate.

Again, ditch property itself is sub-divided into two distinct kinds or species of property—one of which is dependant upon the other. They are—first the ditch, canal, or flume—and secondly, the water right, privilege, or easement.

Either of these may be injured, and the owner may have a remedy for such injury, specially appropriate to the nature of the property, and the nature of the injury. If his ditch be cut or filled up, he may bring trespass, founded on his possession. If his water right be disturbed, he may bring case, founded on his title or property.

The court will bear in mind that the action before it is an action on the case for an injury to the easement of the plaintiffs. There is no averment or pretense of any injury having been committed to their ditch or other corporeal property. The gist of our action is the diversion of water which we had a right to divert, from its natural fountain or stream, thereby preventing a diversion of the same water by us.

The action is founded on the plaintiffs title, or upon their ownership of the incorporeal hereditament or easement.

To enable Howe, therefore, to maintain an action for such an injury after the 19th of July 1856, it is necessary that he should have been one of the owners, not only of the ditch, but of the water right or easement, before that period—and also, that his estate or interest should not have been retroactively divested. This is evident.

We reminded the Court, above, that the acts of acquisition of ditch property were identical with the acts of creation. To illustrate our meaning, we will put a case. A man conceives the idea of constructing a ditch to a stream on the public land. All will admit that his mere conception of the plan is neither *property*, nor *a right*, in any sense of the words. Suppose however, he proceeds to mark a place on the stream to build a dam, and to plant stakes, put up notices, &c. Now he may have some sort of *property* or *right*, founded on his labor in selecting a point for the dam, and placing the notices. But if he has, it is of the lowest kind. At least, he as yet, owns no *easement* or *water right*, such as we say has been injured by defendants. Suppose again, he proceeds in due season to dig a part of the ditch—not sufficient however to divert and obtain control of the water. Now we say he *owns* the part so dug, but he still has no *water right or easement*. If at this stage he should sell his enterprise, and his purchaser should complete it, and obtain control of the water by actual diversion and appropriation, he (the vendor) would not be regarded in law as ever having had a vested title in the easement. His purchaser's right would, by the doctrine of "relation," extend back to, and date from the first act of the entire series which resulted in appropriating the water. But his own right would never be construed to include aught else than the mere corporeal and tangible result of his labor. Thus, in this case, if Howe

sold his share before the completion of the ditch and appropriation—then, even if his share had been fixed and definite from the first, it would not be regarded as extending to the easement, but merely to the part of the ditch completed at the date of the sale.

These principles are so obvious and so fully sustained by reason, that we deem it unnecessary to quote authority in support of them.

We content ourselves with a general reference to the following cases.

Kelly vs. The Natoma Water Co. (6. Cal. rep. 105.)
Couger et als. vs. Weaver et als. ibid 548.
Simpson vs. Eddy, 3. Cal. rep. p. 249.
Irwin vs. Phillips, 5. Cal. rep. 140.

But it will be asked—how does all this affect the case at bar, since the complaint itself shows that plaintiffs appropriation was prior in date to the 19th July 1856, when Howe sold to Kimball?

As a matter of fact, it may be doubtful whether the plaintiff did actually appropriate the water of Sebastapol Spring before Howe quit-claimed to Kimball. But we suppose we are bound by our complaint in this matter, and are willing to be.

In answer then to the question, we say, that taking into consideration the nature of the property, in connection with the facts disclosed by Howe's evidence, we fully establish the correctness of our position, that Howe never had a legal estate in the property, but a mere right, which might at some future time ripen into an estate.

For, granting that we are right in the assumption that neither Kimball or Howe had a vested estate in the easement until actual diversion, and granting further the truth of Howe's statement that the extent of his share was to depend on his future contributions, the following conclusions seem to follow inevitably, viz: Upon the completion of the ditch and the diversion of the water, the *water right* became vested in the projectors jointly—or rather, perhaps, as tenants in common, in proportion to the amount advanced by each.

Inasmuch, however, as Howe had advanced nothing, no share vested in him; so that on the 19th July 1856, he had no interest in the ditch or easement, and of course could not demand of defendants to make amends for the damages.

It will be perceived that our reasoning altogether pretermits the fact that Howe worked on the ditch from its first commencement, till its completion. The reason for this is two fold. 1st. Because we infer from Howe's statement, that the contribution of each of the adventurers was to be in money or its equivalent in materials. The very object of this contribution of each of the adventurers was to employ laborers.

2d. Because he was compensated for his labor in a way entirely inconsistent with the idea of his receiving a share of the ditch for it, viz: by receiving seven dollars per day for it, for the whole time he was engaged. By accepting this sum as compensation for all his rights, Howe estopped himself from saying either to his co-adventurers or to a mere stranger, that he ever had an interest, or that he was entitled to recover damages from them for any act done either before or after such acceptance.

Upon this reasoning we think it clear that the deposition ought to have been admitted in evidence, and that his Honor erred in excluding it.

II.

The Court erred in refusing to set aside the verdict and order a new trial.

This motion was predicated on several grounds, the principal of which were "that the verdict was contrary to evidence," and "error in law occurrring at the trial, and excepted to by the plaintiffs."

The last of these two grounds is based upon the action of the Court in refusing certain instructions of the plaintiffs, and in giving others of the defendants. These very properly come up for argument under our third assignment of error, and we will therefore defer the discussion of them untill we come to argue that; and will confine ourselves at present to the evidence in the case.

We contend that the verdict was contrary to the evidence.

We are aware of the great unwillingness of the Court in ordinary cases, to inter-

fere with the verdict of a jury, or with the action of a *Nisi Prius* Court in sustaining such verdict. Nothing, in our opinion, can be more laudable than this spirit, in an appellate Court.

But cases must often arise, and we know have arisen in our State, where the ends of justice imperitively demand the exercise of this Court's undoubted prerogative to supervise the verdicts of juries, and set them aside, if in conflict with testimony.

O'Keefe vs. Cunningham (9. Cal. rep. p. 589.)
Bagley vs. Eaton, 8. ibid 159.—9. ibid 430.
Same case, July Term, 1858.

The case at bar, we think is one of these cases.

It is fortunate for us, that in this case, there is no real conflict of evidence upon the main point involved.

The question before the the jury was really nothing more than a question of priority; though the question of abandonment, was, improperly as we think, forced upon the attention of the jury.

For the present, we will confine ourselves to a statement of the evidence of the location and appropriation by the plaintiffs and defendants—and the evidence of plaintiffs abandonment of their rights—leaving the question whether defendants could avail themselves of such abandonment, until we come to discuss the instructions given and refused by the Court.

The evidence of the plaintiffs location is as follows:

In May 1854, the plaintiff Harlow Kimball, and one Charles R. Howe, conceived the idea of constructing the ditch afterwards known as the Yuba Ditch, to receive the waters of one of the forks of the north fork of the Yuba river, and all intervening streams and tributaries.

There was a ditch known as the "Kimball Ditch" in existance at that date, but it was a very different thing from the ditch contemplated by Kimball & Howe.

The first step taken was to make a reconnoisance, or preliminary survey of the country, to ascertain the feasibility of their project. This was in May or June of 1854. On the first day of July 1854, Howe, who was the active man in all preparatory matters, put up a number of notices from a point called the "gap of the Saddle Back mountain," to a point above the so called "Sebastapol Spring," the waters of which are now in controversy. The notices in fact extended as far up as Sebastapol Canon or creek—one of the tributaries of the North fork of the Yuba, a distance of over two miles. A copy of this notice, in accordance with the usage of ditch projectors in the mining region, was filed in the County Recorder's office, and actually recorded—the better to preserve the evidence of its contents.

See notice, p. 59, record—Ev. of Webb Nicholson p. 60 ib.

In addition to to the putting up of notices, &c., stakes were planted, trees blazed and such other indicia of the location of a ditch made, as were practicable under the circumstances.

(See evidence of W. B. Mack, p. 61 record—of James Dudley, p. 74 ibid—of Michael Young, p. 73 ib—of N. Mullen, p. 78 ib—of J. R. McFarland, p. 76 of record.)

The evidence shows that the face of the country from the gap of the Saddle Back onward, was exceedingly rough, difficult of access, and almost impervious to the footsteps of the explorer. Indeed, until the enterprise and labor of these plaintiffs had opened up a pathway to the region traversed by them, it had been a *terra incognita* to all other persons. The very names by which points there are now known, were then unheard of, and indeed were not bestowed until sometime in 1855. We trust that the usual destiny of explorers does not await our clients; though if the judgment of the jury who tried this cause be final, our case will form no exception to the bad luck which has attended discoverers, from the time of Columbus to that of Capt. Sutter, and Marshall the gold finder.

As soon as they had sufficiently fixed and marked the line of the ditch—that is to say, about the last of June or first of July 1854—Kimball & Howe commenced the actual construction of the ditch.

(See evidence of Witnesses S. C.)

They employed from the first as many as ten or twelve hands, and in a few days completed the excavation of a piece of ditch between a quarter and a half mile in length. But in the course of a week or ten days, Howe, who acted as superintendent, by passing over the ground, and making a more accurate and careful inspection of the route than he had been able to do before, ascertained that the line they were then at work upon would not, if allowed sufficient grade, take in the very spring now in dispute. But here occurred a difficulty. The line they were then

at work upon, would cross the gap of the Saddle Back upon the surface of the ground; while by dropping down enough to take in the spring, the necessity would be imposed upon them of cutting a tunnel through the ridge, in order to connect the proposed ditch with the country below, which it was intended to supply with water.

A tunnel is a costly work, and Howe, not wishing to incur the responsibility of so extensive a change, left his work, and went to Eureka, to see and consult with his co-adventurer, Kimball. Kimball's consent to the change having been obtained, Howe returned in due season to the scene of operations, and the proposed change of line was at once made. This was about the middle of July 1854.

(See Evidence of W. B. Mack.)

After forsaking the old or upper line, Howe, with another person, immediately began a survey of the lower line. New notices—copies of the old notices, were put up. New stakes were set wherever the dense chapparal would permit it. The brush was cut in many places, and a number of trees were blazed. As soon as the route was settled by these preliminary steps, the laborers were set to digging, while Howe as surveyor, went before them and graded the line for them to dig by. The tunnel was also surveyed, and the two extremities fixed by means of stakes, &c.

They continued to work, until in August 1854, when the men employed were compelled to go below to work on the "Kimball Ditch" with which the "Yuba Ditch" was intended to connect, and which needed repairs. About one half mile was completed on the lower grade before they ceased operations for that year.

The evidence shows that about eight hundred dollars were expended for labor on the proposed ditch, during the summer of 1854.

We have been thus particular in restating the evidence of the first operations of the plaintiffs in 1854, for the reason that fault is found by defendants counsel with such proceedings, and the plaintiffs are charged in respect to them, with a want of due diligence.

We would only add in this connexion, that the line made by the plaintiffs was frequently observed, and easily recognized by a number of persons who passed along during the fall and winter of 1854. It was so plain as to be mistaken for a new road.

(See ev. of McFarland, p. 76—of Johnson, p. 80—of defendants witness Cowen, p. 88—of McFadden, record.)

During all of this period, and until April or May of 1855, no one but the plaintiffs had ever dreamed of appropriating the water of the spring, and no one had even located for mining purposes. The large masses of snow which usually encumber that part of the country, from early fall, until late in the spring, was a sufficient reason why no one was found adventurous enough to make his appearance there in the winter. But the truth is that until the plaintiffs had by their energy opened the way, and set the example, no one had ever conceived the idea of going to so desolate a region, either to mine for gold, or to dig ditches.

Early in the Spring of 1855, the plaintiffs returned to their work, and continued their operations until late in the fall of that year, at which time they were driven out by the snow. In August of that year they commenced the actual construction of the tunnel through the ridge. The work on the tunnel was continued through the winter until it was completed, which was about February 1856.

The Evidence shows that about *eight* ~~hundred~~ *thousand dollars* were expended during the year 1855, in the further construction of the ditch, and that it was so far completed as to be ready to take the particular water in dispute, whenever the tunnel should be finished.

Although the tunnel was finished by the month of February 1856, it was not in a condition to receive and carry water before March of the same year; at which date plaintiffs were actually prepared to divert the Sebastapol water, and did divert it for a brief period, and until prevented by the defendants.

On the other hand, it is not pretended that the defendants made any location or claim, either to the water in dispute, or to the mining claims in the working of which they used such water, before April or May of 1855.

At that time, having located their mining ground on Sebastapol Flat, they appropriated the entire volume of water from Sebastapol Spring, for the purpose of working such claims.

The foregoing are the principal facts disclosed by the statement, and we have no hesitation in asserting that they stand entirely uncontradicted.

Some evidence was introduced by the defence, it is true, to rebut some of the

particular facts or evidence of the plaintiffs, but it does not touch the ground work and foundation of plaintiffs case.

For instance; evidence was given to show that certain marks or hacks on trees were made in 1855, instead of 1854. But at the same time the defence seemed to admit the principal fact, that the plaintiffs did locate and work on their ditch in 1854. It follows then, that whether the hacks were made in 1855 or in 1854, cannot materially affect plaintiffs case—since the question was, not when the trees were blazed—but when the ditch was located.

In addition to the foregoing facts, we would remark, that the evidence shows that the quantity of water furnished by the stream in dispute, was from twenty-four to thirty inches, miner's measure.

This, although called a *spring*, is a large volume of water; and in a region where water sells for seventy-five cents of a dollar per inch, is of considerable value to its owners.

To enable this court to understand fully the position of the ditch and country, the evidence before the jury, and the arguments of Counsel—the maps used at the trial by the respective parties, are by agreement made a part of the record on appeal.

Upon the foregoing detail of the testimony, we ask—where is the evidence to justify the verdict of the jury in favor of the defendants?

Will any one say that we did not take the necessary steps to ascertain the line of our ditch, and notify the world of our claim?

Let him compare the acts of the plaintiffs with those of the defendant Weaver, in the case of Couger et. als. vs Weaver et als., which were held by this Court to be sufficient to constitute a valid water right. (6 Cal. rep. p. 548.)

We deem the proof of our prior appropriation to be conclusive; and inasmuch as it is not really contradicted, we see no way for this Court to escape the conclusion that the verdict is against evidence.

The answer admits the adverse appropriation of the defendants, and therefore there can be no pretext for saying that the jury found as they did because of the absence of proof of damages. Besides, plaintiffs evidence upon the question of damage, is as conclusive as it is upon the question of appropriation.

It was pretended at the trial, we admit, that the plaintiffs had not used due diligence in following up their first location by actual appropriation. In other words that plaintiffs had abandoned their location.

The question of *abandonment* belongs more properly to our discussion of the instructions offered by the plaintiffs. But we will here suggest that the evidence shows a greater degree of diligence than is usual in such cases—and there is not a scintilla of proof either of an actual abandonment by the plaintiffs, or of that sort of involuntary abandonment which is sometimes implied from long continued non user.

No proof of abandonment was offered by the defence; and the fact that the plaintiffs actually completed a large portion of their ditch within a comparatively brief period, is a full and conclusive answer to the inference which is sought to be drawn from the case.

III.

The Court erred in refusing instructions numbered 7, 8 and 9, offered by plaintiffs, and in giving the instructions numbered from 1 to 11 inclusive, offered by the defendants.

See record p. 97. (plaintiffs instructions.)
Ibid p. 98, (defendants instructions.)

The instructions refused by the Court are as follows, viz :—

"7th. If the plaintiffs did, in the summer of 1854, acquire any right to the water now in dispute, then the law presumes they retained the right so by them acquired, and the burthen of proving an abandoment on their part, is with the [redacted]." Defendants"

"8th. That the defendants are confined to the defence set up in their answer, and cannot rely on matters not pleaded by them to defeat this action, and therefore, if defendants in their answer rely exclusively upon priority of location and appropriation as a defence to plaintiffs action, they must now be confined to such defence."

"9th. If the defendants rely on an abandonment by the plaintiffs, they must aver it in their answer, and establish it by their proof."

It would be somewhat difficult to ascertain his Honor's objections to these instructions, had he not himself informed us.

As regards the first, (No. 7,) he objects that it is not predicated upon the evidence—as it was not shown that the plaintiffs acquired any right to the disputed water in 1854.

His objection to our position that *abandonment* is a special defence and must be specially pleaded, is that we should have objected to the introduction of any proof of abandonment if it was not warranted by the pleadings, &c. He then proceeds to remark that he fully explained the doctrine of *relation* to the jury, &c.

Now it seems to us that it is upon this very doctrine of relation that we differ from the learned Judge. He says there is no proof that we acquired any rights, &c. in 1854. But we say that according to the very doctrine of *relation* mentioned by him—if we commenced our operations to divert the Sebastapol water in 1854, and completed them in 1856—our acquisition of the easement relates back and dates from the year 1854. That is to say, by construction of law, we are supposed, as against all subsequent intruders, to have acquired our right in that year.

Kelly vs. The Natoma Water Co., (6 Cal. rep. p. 105.)
Barnes vs. Stark, (4. Cal. rep. p. 414.)

In this last case, Mr. Justice Wells expressly adopts the language of the Court below, that "where a number of acts are to be performed by virtue of which a right accrues, the time of performance of the last act relates back to the commencement of the series of acts which create the right, so as to make it (the right) perfect when the first act was being commenced."

See also, Viner's Abr. Title *Relation*.
Jackson vs. McCall, (3. Cowen, rep. p. 80.)
Jackson vs. Bull, (1. Johns. Cas. p. 81.)
Jackson vs. Raymond, (ibid. p. 85 note.)
Case vs. DeGoes, (3. Caines Cas. p. 262.)
Jackson vs. Bard, (4. Johns. rep. p. 234.)

In Heath vs. Boss, a patent for land dated the 4th of December, but which did not pass the great seal until the 28th, was held to relate back so as to vest the title in the patentee from the date.

12. Johns. rep. p. 140.

The authorities are quite numerous, but the above will suffice.

If we did commence in 1854, then our title is supposed to have vested, or to have been acquired at that time. Possibly the difference between the District Judge and ourselves is a purely verbal one; but an instruction, otherwise legal and proper, ought not to be refused beaause of a mere verbal objection.

But we cannot help thinking that his Honor misconceived the law of *relation*, and that the entire explanation which he states he gave to the jury, was erroneous.

The true import of the doctrine of *relation* being established, no one will deny the legal propriety of the instruction. It merely reiterates the well known rule, that the existence of a right being shown, its continuance will be presumed—and that the burthen of disproving its present existence is with those who deny it.

The other point of difference between the Court and ourselves, is upon a mere question of fact. He says we ought to have objected to the defendants evidence of the plaintiffs abandonment; thereby implying that evidence was offered by the defendants expressly to prove abandonment.

Now, as a matter of fact, no such evidence was offered.

All the evidence offered by the defendants was admissible in some point of view. No evidence was offered avowedly for the purpose of showing an abandonment.

What we objected to, was the attempt of the defendants to infer from the general circumstances and history of the case, abandonment by the plaintiffs, and to impress such inference upon the jury. In our 9th instruction we distinctly affirm that the defendants must plead an abandonment by the plaintiffs and *prove* it; which we would scarcely have said, had the defendants actually introduced such proof. Our point was, that the defendants were trying to avail themselves of an abandonment on our part, without having pleaded or proved it.

Instructions are frequently asked for no other purpose, than to refute the erroneous position of counsel, when it is apprehended that their error may be imposed upon the minds of the jury. And our instruction could be sustained upon this ground, if on no other.

All these instructions are, beyond doubt, correct. *Abandonment*, like *forfeiture*, is a special defense and must be pleaded. Especially is this true of that sort of abandonment which takes place against the will of the party. It then assumes many of the distinctive features, and all of the consequences of forfeiture.

An abandonment, properly so called, can only be voluntary. But there are cases where a *non user* for a given period, will be regarded as tantamount to the expression of a determination to abandon. It is this latter sort of abandonment which bears so striking a resemblance to a forfeiture. For in ninty-nine out of every one hundred instances of abandonment by *non user*, the will does not in fact consent.

3. Kent's Com § 448, 449, 450.

All authorities concur in holding that a right can only be lost by non user, where the non user extends over a period sufficient to vest a title by prescription.

Domat's Civil Law § 1030. 3. Kent's Com. § 448.
Lawrence vs. Obee (3. Campbell 514.)
Corning vs. Gould, (16. Wend. 513.)
Yeakle vs. Nace, (2. Wharton's rep. 123.)

The same principle has been applied by this Court to water privileges on the public lands, and to mining claims.

Crandall vs. Woods, (8. Cal. rep. 136.)
Partridge vs. Townsend et als. July Term 1858.

The latter case is exactly in point.

The Civil Law in this respect agrees literally with ours. Indeed it seems to be taken for granted, that our law of easements and servitudes was derived from the Roman Law.

Domat's Civil Law § 1030 *et seq.*

The principle has often been applied to offices, and other franchises.

From the various reported cases, the following rule of proceedure may be adduced:

When a man holds a right or franchise of a public nature, and it is alleged that he has abandoned it by *non user*, the fact can only be definitely ascertained and adjudged by a judicial proceeding in which the question is directly involved.

Hardin vs. Page, (8. B Monroe, 648.)

In this case the principle is applied to public offices.

The Alabama and New Hampshire reports also abound in similar cases, but not having the books we cannot make more particular references.

In the case of private rights or easements acquired by location or prescription, if a party seeks to show an abandonment by continued non user, he must plead it, whether he is party plaintiff or defendant.

We may here remark that the principle for which we contend, is generally applicable to all cases where a right once vested, is sought to be divested because of the failure of the party to do something required by law. The defences of the Statutes of Frauds and limitations are familiar examples of our meaning.

We would remark in conclusion, that there was not the slightest evidence before the jury of any *non user* by the plaintiffs. The case of Partridge vs. Townsend, cited above, is a conclusive authority upon this point.

We presume the jury must have been carried away by some such idea; but if so, they acted without evidence, and their action should be rectified.

McCONNELL & NILES,
And H. I. THORNTON, Jr.
Of Counsel with Appellants.

In Supreme Court,

STATE OF CALIFORNIA.

HARLOW KIMBALL, *et. als.*—Appellants.

vs.

WILLIAM GEARHART, *et. als.*—Respondents.

APPELLANTS' BRIEF.

McCONNELL & NILES, And H. I. THORNTON, Jr.
Of Counsel with Appellants.

Filed Nov 5 1858

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vs.

WILLIAM GEARHART, *et. als.*—Respondents.

APPELLANT'S BRIEF.

We ask the reversal of the judgment in this case, upon the following grounds, viz:—

I. The Court below erred in ruling out the deposition of Charles R. Howe, as evidence at the trial of said cause.

II. The Court erred in refusing to set aside the verdict of the jury in said cause, and grant a new trial upon the following grounds:

1st. Surprise, which ordinary prudence on the part of plaintiffs would not have guarded against.

2d. Insufficiency of the evidence to justify the verdict rendered by the jury.

3d. Error in law, occurring at the trial, and duly excepted to by the plaintiffs.

4th. The verdict is contrary to law and evidence.

III. The Court erred in refusing the instructions asked by plaintiffs, numbered 7, 8, and 9; and in giving those asked by defendants, numbered from 1 to 11, inclusive.

I.

The first point assigned for error, consists in the ruling out of the deposition of Charles R. Howe.

The reasons which induced this action of the Court were briefly as follows:—Our complaint originally claimed damages from some time in March, 1856. At the April Term of the Court for the year 1858, when this cause was tried, and the jury failed to find a verdict—we so amended our complaint as to relinquish all claim for damages "*previous to July the 18th* 1856." Howe testified at the trial in April. Before the next term of the Court, Howe left the State, and his deposition was taken.

At the trial in July last, it was ascertained by the conveyance from Howe to Harlow Kimball, which had been introduced in evidence at the trial in April, that he had only parted with his interest in the plaintiffs ditch so late as July the 19th, 1856; and upon this showing, as well as upon his answers when examined as to interest, contained in the first part of the deposition, the defendants objected to his deposition because of his alleged interest in the damages claimed, for a single day, viz:—July the 18th 1856.

The Court sustained the objection, and the plaintiffs excepted.

The complaint was again amended so as to remit all claim for damages during the entire month of July 1856. But the Court persisted in excluding the deposition. (See record p. p. 17–28, inclusive.)

The ground of the exclusion of the deposition, was the existence of Howe's alleged interest in the damages for the 18th of July 1856. It was said that the re-

cord in the present action might be evidence for or against him in any suit he might hereafter institute for such damages.

Now if we show that Howe had no such interest *after* the 19th day of July 1856 as is alleged, we exonerate his deposition from the objections urged against it, and demonstrate its admissibility. This is evident. And we shall use the same evidence to prove his want of interest, as was used by the defendants, to establish its existence, viz:—his preliminary examination as to interest, contained in the first part of the deposition.

This suit is an action on the case for the recovery of damages caused by the wrongful diversion of water, to the use of which the plaintiffs were entitled.

(See complaint p. 1. of record.)

The water right, or easement alleged to have been disturbed and injured, pertains to a certain ditch situate on the public land, called the "Yuba Ditch."

This ditch was projected in May 1854.

As shown by Howe's preliminary examination, Harlow Kimball and himself were the original projectors of such ditch.

The statement made by Howe, and relied on by defendants, is substantially as follows:—

In May 1854, Kimball and himself conceived the project of constructing the ditch mentioned in the complaint, to bring in the water of the North fork of the North Yuba river, and its tributaries, to Eureka and vicinity.

Howe had no pecuniary means nor credit, and Kimball assumed the burthen of advancing all the funds immediately necessary—with the understanding however, that Howe should hereafter advance his share of the cost and expenses—and that he should then have an interest commensurate with his advances.

In the meanwhile, Howe was to devote his time and labor to the construction of the ditch, &c.

The plan adopted by them is very common in our part of the State. Men frequently embark in the enterprise of ditching, and other enterprises, without the requisite funds—depending upon the future to raise them. As they do not know what share of the cost they will be able to advance, the extent of their interest remains unascertained until they do pay the money, when it becomes immediately fixed and determined.

This is exactly what Howe means by his repeated statements "that he never knew what was the extent of his interest in the enterprise."

Two years passed—the ditch was near its completion—and still Howe had not contributed a single cent towards its cost.

In the meanwhile, Kimball became deeply involved in debt to Johnson & Hickok for money and material advanced by them *upon his credit* towards the construction of the work.

It became absolutely necessary that Howe should comply with the condition of his arrangement with Kimball, and advance a part of the money—or that he should suffer his estate to be determined, and back out of the enterprise *in toto*. He chose the latter. Perhaps he had no option in the matter—for the only mode Kimball had of satisfying Johnson & Hickok, was by conveying to them a two-fifths interest in the ditch; and they refused to take such conveyance, while the bankrupt Howe was regarded as having any interest, however slight.

Howe therefore conveyed to Kimball on the 19th of July 1856, and on the same day Kimball conveyed to Johnson & Hickok two-fifths of the whole enterprise. The two transactions were in fact but parts of the same transaction, as Howe's evidence shows.

Howe, in his deed to Kimball, quit claimed to him *one half* of the whole work, because his interest *might* have amounted to a half had he complied with his original agreement, and advanced the necessary money.

Now mark the terms of this whole arrangment so far as Howe is concerned.

Although as a matter of form, a sum is named in the deed as a consideration, yet in point of fact, he received not a cent by way of consideration, properly so called. But from his own statement, it appears that the only advantage he derived from the transaction, was first, a release from all liability to Johnson & Hickok by reason of the indebtedness to them; and secondly, he was to receive from Kimball, and Johnson & Hickok, compensation for all the labor and care he had bestowed upon the work, *from its very commencement*, at the rate of seven dollars per day.

This last arrangement is conclusive upon the view taken by the parties themselves, of Howe's original interest. In fact, the entire transaction shows that the parties themselves, regarded Howe as never having had a vested estate or interest in the enterprise, and that the deed was taken from him merely as a matter of precaution.

Now the question recurs upon the nature of Howe's estate or interest, before the 19th July 1856—and what effect the transactions of that date had upon it.

In the first place, we admit that Howe had such an interest before the 19th of July 1856, as would disqualify him as a witness in any action *instituted before that date.* But that is a very different question from the one presented by the record.

It is evident that Howe occupied towards Kimball and the enterprise, one of the two following positions, *viz*: first, at the commencement of the ditch, he had an interest *in presenti*, subject to be defeated by a future contingency, viz: the non payment of his proportion of the cost.

Or secondly, he may be regarded as having at the beginning of the enterprise only an inchoate right, capable of ripening into a vested interest *in futuro*, upon the happening of a certain contingency, viz: the payment of his part of the cost.

We care not which of the two positions be assigned to him, as he is equally competent in either case. We may observe, however, that the nature of the property itself, strongly militates against the first named position.

Assuming the first hypothesis to be correct, we lay down this proposition;—upon the happening of the contingency upon which his estate depended, he became divested of such estate *retroactively*, and his title thereto, as well as all of its incidents became as if they had never existed.

In this respect, it resembles more nearly than anything else an estate upon condition, created by deed. It is true there was no deed in this case, but the parties originally stood in the same position towards the property, and there was a contract or agreement between them, the final execution of which depended upon a condition. One other point of difference is to be found in the fact that a deed conveying an estate in lands &c., operates upon property having a present existence—whereas, in our case the original agreement or understanding between Howe & Kimball, was to operate upon property to be created by their future joint efforts. But this difference evidently tends to establish the propriety of our attempt to apply the law of "estates upon condition" to cases like the present.

The rule in relation to estates upon condition is, that when the estate is divested by the failure of the grantee to perform the condition, it operates retroactively; and while the grantee, or feoffee on condition is supposed in law never to have had an estate—the grantor shall enter as of his old title, and shall be regarded as having been all along the owner of the property.

"Regularly it is true, that he that entereth for a condition broken, shall be seized in his first estate—or of that estate which he had at the time of the estate made upon condition." Coke on Litt. 202 (a.)

In almost the same words, the same rule is stated in Bacon's Abridgment, and the practical consequences of the rule are also mentioned.

"It is laid down as a rule, that he who enters for a condition broken, shall be in of the same estate he was before; and therefore shall avoid all mesne charges and incumbrances."

Bac. Abr. Title *Condition*, Vol. 2. p. 316.

One of our own standard works in land law, states the rule as follows:

"Entry for condition broken has the effect of entirely defeating the estate of the grantee, and restoring the grantor to the *same title* which he had before the conveyance was made. It constitutes a paramount claim, and operates by relation so as to avoid all intermediate incumbrances."

1. Hilliard on Real Property, p. 369.

Chancellor Kent, after showing the distinction between a condition in law or a limitation, which of itself defeats the estate without entry—and a condition in deed or ordinary condition, which though broken does not avoid the estate until the entry made, says:—"But when the grantor does enter for condition broken, he is in of his former estate."

4. Kents Com. § 123—127.

Before condition broken, the grantee is the actual owner of the property, and may in many respects treat it as such owner. Thus, he would be the proper party to bring an action for waste, trespass, or other injury either to the possession or freehold, committed before his estate determined—provided such action was also commenced during its existence. But suppose a stranger should commit waste upon land conveyed upon condition, before condition broken; and suppose before any action was instituted therefor, the estate became determined and divested by entry for condition broken; who then would be the proper party to sue? The grantor, of course—for he is in of his old estate; and by presumption of law, and according to the doctrine of *relation*, the estate has never been out of him. So far does the rule go, that even had the grantee on condition recovered damages of a stranger for waste, before the grantors entry, the grantor would probably have been entitled to an account of such damages.

Now apply the same rule to the case at bar.

Before the transactions of the 19th July 1856—which we regard as being tantamount to an entry for breach of condition—Howe could have joined in any action

brought to recover compensation for an injury to his interest in the ditch or easement. But the effect of those transactions, was to divest him not only of his present and future interest therein, but *retroactively* of his past estate likewise. He could then no more sustain an action for injuries committed before, than he could for injuries committed after that date. In contemplation of law, he never had any interest—but Kimball was the sole owner during the entire period; and as this form of action must necessarily be founded on title of ownership, Kimball, as owner in the legal sense, could alone sue for past injuries to the easement.

Had Howe actually sued some one for such injuries before the determination of his interest, and recovered judgment, according to the rule above stated, Kimball would probably have had a right to demand an account from him of the sum recovered.

We would here suggest—what seems sufficiently clear—that were a grantor who has entered, or who has a right to enter and evict a grantee for condition broken, to take a conveyance from his grantee of the same property through abundance of caution, he would still be in as of his old estate, and not through the grantee. He would be in in the *post*, and not in the *per*. The law would at once remit him to his original paramount title, and not drive him to hold through the vicious title of his grantee.

The foregoing is advanced upon the hypothesis that Howe had from the commencement, a vested estate in the property injured, subject to a future contingency.

But when we consider the peculiar nature of that species of property, as well as the situation of Howe in respect to it, as disclosed by his answers, we are led to the conclusion that he cannot be so regarded.

In one very essential respect, this species of property differs from all other kinds hitherto known to the law. That difference consists in this—that ditch property is created by the very acts which give title to it. We know of no other species of property (except mining claims) of which the same can be said.

It follows necessarily, that at the date of the original arrangment between Howe and Kimball, there was nothing *in esse* for either of them to own, and therefore neither could, at that time, have had a vested estate.

Again, ditch property itself is sub-divided into two distinct kinds or species of property—one of which is dependant upon the other. They are—first the ditch, canal, or flume—and secondly, the water right, privilege, or easement.

Either of these may be injured, and the owner may have a remedy for such injury, specially appropriate to the nature of the property, and the nature of the injury. If his ditch be cut or filled up, he may bring trespass, founded on his possession. If his water right be disturbed, he may bring case, founded on his title or property.

The court will bear in mind that the action before it is an action on the case for an injury to the easement of the plaintiffs. There is no averment or pretense of any injury having been committed to their ditch or other corporeal property. The gist of our action is the diversion of water which we had a right to divert, from its natural fountain or stream, thereby preventing a diversion of the same water by us.

The action is founded on the plaintiffs title, or upon their ownership of the incorporeal hereditament or easement.

To enable Howe, therefore, to maintain an action for such an injury after the 19th of July 1856, it is necessary that he should have been one of the owners, not only of the ditch, but of the water right or easement, before that period—and also, that his estate or interest should not have been retroactively divested. This is evident.

We reminded the Court, above, that the acts of acquisition of ditch property were identical with the acts of creation. To illustrate our meaning, we will put a case. A man conceives the idea of constructing a ditch to a stream on the public land. All will admit that his mere conception of the plan is neither *property*, nor *a right*, in any sense of the words. Suppose however, he proceeds to mark a place on the stream to build a dam, and to plant stakes, put up notices, &c. Now he may have some sort of *property* or *right*, founded on his labor in selecting a point for the dam, and placing the notices. But if he has, it is of the lowest kind. At least, he as yet, owns no *easement* or *water right*, such as we say has been injured by defendants. Suppose again, he proceeds in due season to dig a part of the ditch—not sufficient however to divert and obtain control of the water. Now we say he *owns* the part so dug, but he still has no *water right or easement*. If at this stage he should sell his enterprise, and his purchaser should complete it, and obtain control of the water by actual diversion and appropriation, he (the vendor) would not be regarded in law as ever having had a vested title in the easement. His purchaser's right would, by the doctrine of "relation," extend back to, and date from the first act of the entire series which resulted in appropriating the water. But his own right would never be construed to include aught else than the mere corporeal and tangible result of his labor. Thus, in this case, if Howe

sold his share before the completion of the ditch and appropriation—then, even if his share had been fixed and definite from the first, it would not be regarded as extending to the easement, but merely to the part of the ditch completed at the date of the sale.

These principles are so obvious and so fully sustained by reason, that we deem it unnecessary to quote authority in support of them.

We content ourselves with a general reference to the following cases.

Kelly vs. The Natoma Water Co. (6. Cal. rep. 105.)
Couger et als. vs. Weaver et als. ibid 548.
Simpson vs. Eddy, 3. Cal. rep. p. 249.
Irwin vs. Phillips, 5. Cal. rep. 140.

But it will be asked—how does all this affect the case at bar, since the complaint itself shows that plaintiffs appropriation was prior in date to the 19th July 1856, when Howe sold to Kimball?

As a matter of fact, it may be doubtful whether the plaintiff did actually appropriate the water of Sebastapol Spring before Howe quit-claimed to Kimball. But we suppose we are bound by our complaint in this matter, and are willing to be.

In answer then to the question, we say, that taking into consideration the nature of the property, in connection with the facts disclosed by Howe's evidence, we fully establish the correctness of our position, that Howe never had a legal estate in the property, but a mere right, which might at some future time ripen into an estate.

For, granting that we are right in the assumption that neither Kimball or Howe had a vested estate in the easement until actual diversion, and granting further the truth of Howe's statement that the extent of his share was to depend on his future contributions, the following conclusions seem to follow inevitably, viz: Upon the completion of the ditch and the diversion of the water, the *water right* became vested in the projectors jointly—or rather, perhaps, as tenants in common, in proportion to the amount advanced by each.

Inasmuch, however, as Howe had advanced nothing, no share vested in him; so that on the 19th July 1856, he had no interest in the ditch or easement, and of course could not demand of defendants to make amends for the damages.

It will be perceived that our reasoning altogether pretermits the fact that Howe worked on the ditch from its first commencement, till its completion. The reason for this is two fold. 1st. Because we infer from Howe's statement, that the contribution of each of the adventurers was to be in money or its equivalent in materials. The very object of this contribution of each of the adventurers was to employ laborers.

2d. Because he was compensated for his labor in a way entirely inconsistent with the idea of his receiving a share of the ditch for it, viz: by receiving seven dollars per day for it, for the whole time he was engaged. By accepting this sum as compensation for all his rights, Howe estopped himself from saying either to his co-adventurers or to a mere stranger, that he ever had an interest, or that he was entitled to recover damages from them for any act done either before or after such acceptance.

Upon this reasoning we think it clear that the deposition ought to have been admitted in evidence, and that his Honor erred in excluding it.

II.

The Court erred in refusing to set aside the verdict and order a new trial.

This motion was predicated on several grounds, the principal of which were "that the verdict was contrary to evidence,"—and "error in law occurrring at the trial, and excepted to by the plaintiffs."

The last of these two grounds is based upon the action of the Court in refusing certain instructions of the plaintiffs, and in giving others of the defendants. These very properly come up for argument under our third assignment of error, and we will therefore defer the discussion of them untill we come to argue that; and will confine ourselves at present to the evidence in the case.

We contend that the verdict was contrary to the evidence.

We are aware of the great unwillingness of the Court in ordinary cases, to inter-

fere with the verdict of a jury, or with the action of a *Nisi Prius* Court in sustaining such verdict. Nothing, in our opinion, can be more laudable than this spirit, in an appellate Court.

But cases must often arise, and we know have arisen in our State, where the ends of justice imperitively demand the exercise of this Court's undoubted prerogative to supervise the verdicts of juries, and set them aside, if in conflict with testimony.

O'Keefe vs. Cunningham (9. Cal. rep. p. 589.)
Bagley vs. Eaton, 8. ibid 159.—9. ibid 430.
Same case, July Term, 1858.

The case at bar, we think is one of these cases.

It is fortunate for us, that in this case, there is no real conflict of evidence upon the main point involved.

The question before the the jury was really nothing more than a question of priority; though the question of abandonment, was, improperly as we think, forced upon the attention of the jury.

For the present, we will confine ourselves to a statement of the evidence of the location and appropriation by the plaintiffs and defendants—and the evidence of plaintiffs abandonment of their rights—leaving the question whether defendants could avail themselves of such abandonment, until we come to discuss the instructions given and refused by the Court.

The evidence of the plaintiffs location is as follows:

In May 1854, the plaintiff Harlow Kimball, and one Charles R. Howe, conceived the idea of constructing the ditch afterwards known as the Yuba Ditch, to receive the waters of one of the forks of the north fork of the Yuba river, and all intervening streams and tributaries.

There was a ditch known as the "Kimball Ditch" in existance at that date, but it was a very different thing from the ditch contemplated by Kimball & Howe.

The first step taken was to make a reconnoisance, or preliminary survey of the country, to ascertain the feasibility of their project. This was in May or June of 1854. On the first day of July 1854, Howe, who was the active man in all preparatory matters, put up a number of notices from a point called the "gap of the Saddle Back mountain," to a point above the so called "Sebastapol Spring," the waters of which are now in controversy. The notices in fact extended as far up as Sebastapol Canon or creek—one of the tributaries of the North fork of the Yuba, a distance of over two miles. A copy of this notice, in accordance with the usage of ditch projectors in the mining region, was filed in the County Recorder's office, and actually recorded—the better to preserve the evidence of its contents.

See notice, p. 59, record—Ev. of Webb Nicholson p. 60 ib.

In addition to to the putting up of notices, &c., stakes were planted, trees blazed and such other indicia of the location of a ditch made, as were practicable under the circumstances.

(See evidence of W. B. Mack, p. 61 record—of James Dudley, p. 74 ibid—of Michael Young, p. 73 ib—of N. Mullen, p. 78 ib—of J. R. McFarland, p. 76 of record.)

The evidence shows that the face of the country from the gap of the Saddle Back onward, was exceedingly rough, difficult of access, and almost impervious to the footsteps of the explorer. Indeed, until the enterprise and labor of these plaintiffs had opened up a pathway to the region traversed by them, it had been a *terra incognita* to all other persons. The very names by which points there are now known, were then unheard of, and indeed were not bestowed until sometime in 1855. We trust that the usual destiny of explorers does not await our clients; though if the judgment of the jury who tried this cause be final, our case will form no exception to the bad luck which has attended discoverers, from the time of Columbus to that of Capt. Sutter, and Marshall the gold finder.

As soon as they had sufficiently fixed and marked the line of the ditch—that is to say, about the last of June or first of July 1854—Kimball & Howe commenced the actual construction of the ditch.

(See evidence of Witnesses S. C.)

They employed from the first as many as ten or twelve hands, and in a few days completed the excavation of a piece of ditch between a quarter and a half mile in length. But in the course of a week or ten days, Howe, who acted as superintendent, by passing over the ground and making a more accurate and careful inspection of the route than he had been able to do before, ascertained that the line they were then at work upon would not, if allowed sufficient grade, take in the very spring now in dispute. But here occurred a difficulty. The line they were then

at work upon, would cross the gap of the Saddle Back upon the surface of the ground; while by dropping down enough to take in the spring, the necessity would be imposed upon them of cutting a tunnel through the ridge, in order to connect the proposed ditch with the country below, which it was intended to supply with water.

A tunnel is a costly work, and Howe, not wishing to incur the responsibility of so extensive a change, left his work, and went to Eureka, to see and consult with his co-adventurer, Kimball. Kimball's consent to the change having been obtained, Howe returned in due season to the scene of operations, and the proposed change of line was at once made. This was about the middle of July 1854.

(See Evidence of W. B. Mack.)

After forsaking the old or upper line, Howe, with another person, immediately began a survey of the lower line. New notices—copies of the old notices, were put up. New stakes were set wherever the dense chapparal would permit it. The brush was cut in many places, and a number of trees were blazed. As soon as the route was settled by these preliminary steps, the laborers were set to digging, while Howe as surveyor, went before them and graded the line for them to dig by. The tunnel was also surveyed, and the two extremities fixed by means of stakes, &c.

They continued to work, until in August 1854, when the men employed were compelled to go below to work on the "Kimball Ditch" with which the "Yuba Ditch" was intended to connect, and which needed repairs. About one half mile was completed on the lower grade before they ceased operations for that year.

The evidence shows that about eight hundred dollars were expended for labor on the proposed ditch, during the summer of 1854.

We have been thus particular in restating the evidence of the first operations of the plaintiffs in 1854, for the reason that fault is found by defendants counsel with such proceedings, and the plaintiffs are charged in respect to them, with a want of due diligence.

We would only add in this connexion, that the line made by the plaintiffs was frequently observed, and easily recognized by a number of persons who passed along during the fall and winter of 1854. It was so plain as to be mistaken for a new road.

(See ev. of McFarland, p. 76—of Johnson, p. 80—of defendants witness Cowen, p. 88—of McFadden, record.)

During all of this period, and until April or May of 1855, no one but the plaintiffs had ever dreamed of appropriating the water of the spring, and no one had even located for mining purposes. The large masses of snow which usually encumber that part of the country, from early fall, until late in the spring, was a sufficient reason why no one was found adventurous enough to make his appearance there in the winter. But the truth is that until the plaintiffs had by their energy opened the way, and set the example, no one had ever conceived the idea of going to so desolate a region, either to mine for gold, or to dig ditches.

Early in the Spring of 1855, the plaintiffs returned to their work, and continued their operations until late in the fall of that year, at which time they were driven out by the snow. In August of that year they commenced the actual construction of the tunnel through the ridge. The work on the tunnel was continued through the winter until it was completed, which was about February 1856.

The Evidence shows that about *eight* [redacted] *dollars* were expended during the year 1855, in the further construction of the ditch, and that it was so far completed as to be ready to take the particular water in dispute, whenever the tunnel should be finished.

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Although the tunnel was finished by the month of February 1856, it was not in a condition to receive and carry water before March of the same year; at which date plaintiffs were actually prepared to divert the Sebastapol water, and did divert it for a brief period, and until prevented by the defendants.

On the other hand, it is not pretended that the defendants made any location or claim, either to the water in dispute, or to the mining claims in the working of which they used such water, before April or May of 1855.

At that time, having located their mining ground on Sebastapol Flat, they appropriated the entire volume of water from Sebastapol Spring, for the purpose of working such claims.

The foregoing are the principal facts disclosed by the statement, and we have no hesitation in asserting that they stand entirely uncontradicted.

Some evidence was introduced by the defence, it is true, to rebut some of the

particular facts or evidence of the plaintiffs, but it does not touch the ground work and foundation of plaintiffs case.

For instance; evidence was given to show that certain marks or hacks on trees were made in 1855, instead of 1854. But at the same time the defence seemed to admit the principal fact, that the plaintiffs did locate and work on their ditch in 1854. It follows then, that whether the hacks were made in 1855 or in 1854, cannot materially affect plaintiffs case—since the question was, not when the trees were blazed—but when the ditch was located.

In addition to the foregoing facts, we would remark, that the evidence shows that the quantity of water furnished by the stream in dispute, was from twenty-four to thirty inches, miner's measure.

This, although called a *spring*, is a large volume of water; and in a region where water sells for seventy-five cents or a dollar per inch, is of considerable value to its owners.

To enable this court to understand fully the position of the ditch and country, the evidence before the jury, and the arguments of Counsel—the maps used at the trial by the respective parties, are by agreement made a part of the record on appeal.

Upon the foregoing detail of the testimony, we ask—where is the evidence to justify the verdict of the jury in favor of the defendants?

Will any one say that we did not take the necessary steps to ascertain the line of our ditch, and notify the world of our claim?

Let him compare the acts of the plaintiffs with those of the defendant Weaver, in the case of Couger et. als. vs Weaver et als., which were held by this Court to be sufficient to constitute a valid water right. (6 Cal. rep. p. 548.)

We deem the proof of our prior appropriation to be conclusive; and inasmuch as it is not really contradicted, we see no way for this Court to escape the conclusion that the verdict is against evidence.

The answer admits the adverse appropriation of the defendants, and therefore there can be no pretext for saying that the jury found as they did because of the absence of proof of damages. Besides, plaintiffs evidence upon the question of damage, is as conclusive as it is upon the question of appropriation.

It was pretended at the trial, we admit, that the plaintiffs had not used due diligence in following up their first location by actual appropriation. In other words that plaintiffs had abandoned their location.

The question of *abandonment* belongs more properly to our discussion of the instructions offered by the plaintiffs. But we will here suggest that the evidence shows a greater degree of diligence than is usual in such cases—and there is not a scintilla of proof either of an actual abandonment by the plaintiffs, or of that sort of involuntary abandonment which is sometimes implied from long continued non user.

No proof of abandonment was offered by the defence; and the fact that the plaintiffs actually completed a large portion of their ditch within a comparatively brief period, is a full and conclusive answer to the inference which is sought to be drawn from the case.

III.

The Court erred in refusing instructions numbered 7, 8 and 9, offered by plaintiffs, and in giving the instructions numbered from 1 to 11 inclusive, offered by the defendants.

See record p. 97. (plaintiffs instructions.)
Ibid p. 98, (defendants instructions.)

The instructions refused by the Court are as follows, viz :—

"7th. If the plaintiffs did, in the summer of 1854, acquire any right to the water now in dispute, then the law presumes they retained the right so by them acquired, and the burthen of proving an abandoment on their part, is with the ~~plaintiffs~~ Defendants"

"8th. That the defendants are confined to the defence set up in their answer, and cannot rely on matters not pleaded by them to defeat this action, and therefore, if defendants in their answer rely exclusively upon priority of location and appropriation as a defence to plaintiffs action, they must now be confined to such defence."

"9th. If the defendants rely on an abandonment by the plaintiffs, they must aver it in their answer, and establish it by their proof."

It would be somewhat difficult to ascertain his Honor's objections to these instructions, had he not himself informed us.

As regards the first, (No. 7,) he objects that it is not predicated upon the evidence—as it was not shown that the plaintiffs acquired any right to the disputed water in 1854.

His objection to our position that *abandonment* is a special defence and must be specially pleaded, is that we should have objected to the introduction of any proof of abandonment if it was not warranted by the pleadings, &c. He then proceeds to remark that he fully explained the doctrine of *relation* to the jury, &c.

Now it seems to us that it is upon this very doctrine of relation that we differ from the learned Judge. He says there is no proof that we acquired any rights, &c. in 1854. But we say that according to the very doctrine of *relation* mentioned by him—if we commenced our operations to divert the Sebastapol water in 1854, and completed them in 1856—our acquisition of the easement relates back and dates from the year 1854. That is to say, by construction of law, we are supposed, as against all subsequent intruders, to have acquired our right in that year.

Kelly vs. The Natoma Water Co., (6 Cal. rep. p. 105.)
Barnes vs. Stark, (4. Cal. rep. p. 414.)

In this last case, Mr. Justice Wells expressly adopts the language of the Court below, that "where a number of acts are to be performed by virtue of which a right accrues, the time of performance of the last act relates back to the commencement of the series of acts which create the right, so as to make it (the right) perfect when the first act was being commenced."

See also, Vibers Abr. Title *Relation.*
Jackson vs. McCall, (3. Cowen, rep. p. 80.)
Jackson vs. Bull, (1. Johns. Cas. p. 81.)
Jackson vs. Raymond, (ibid. p. 85 note.)
Case vs. DeGoes, (3. Caines Cas. p. 262.)
Jackson vs. Bard, (4. Johns. rep. p. 234.)

In Heath vs. Boss, a patent for land dated the 4th of December, but which did not pass the great seal until the 28th, was held to relate back so as to vest the title in the patentee from the date.

12. Johns. rep. p. 140.

The authorities are quite numerous, but the above will suffice.

If we did commence in 1854, then our title is supposed to have vested, or to have been acquired at that time. Possibly the difference between the District Judge and ourselves is a purely verbal one; but an instruction, otherwise legal and proper, ought not to be refused because of a mere verbal objection.

But we cannot help thinking that his Honor misconceived the law of *relation*, and that the entire explanation which he states he gave to the jury, was erroneous.

The true import of the doctrine of *relation* being established, no one will deny the legal propriety of the instruction. It merely reiterates the well known rule, that the existence of a right being shown, its continuance will be presumed—and that the burthen of disproving its present existence is with those who deny it.

The other point of difference between the Court and ourselves, is upon a mere question of fact. He says we ought to have objected to the defendants evidence of the plaintiffs abandonment; thereby implying that evidence was offered by the defendants expressly to prove abandonment.

Now, as a matter of fact, no such evidence was offered.

All the evidence offered by the defendants was admissible in some point of view. No evidence was offered avowedly for the purpose of showing an abandonment.

What we objected to, was the attempt of the defendants to infer from the general circumstances and history of the case, abandonment by the plaintiffs, and to impress such inference upon the jury. In our 9th instruction we distinctly affirm that the defendants must plead an abandonment by the plaintiffs and *prove* it; which we would scarcely have said, had the defendants actually introduced such proof. Our point was, that the defendants were trying to avail themselves of an abandonment on our part, without having pleaded or proved it.

Instructions are frequently asked for no other purpose, than to refute the erroneous position of counsel, when it is apprehended that their error may be imposed upon the minds of the jury. And our instruction could be sustained upon this ground, if on no other.

All these instructions are, beyond doubt, correct. *Abandonment*, like *forfeiture*, is a special defense and must be pleaded. Especially is this true of that sort of abandonment which takes place against the will of the party. It then assumes many of the distinctive features, and all of the consequences of forfeiture.

An abandonment, properly so called, can only be voluntary. But there are cases where a *non user* for a given period, will be regarded as tantamount to the expression of a determination to abandon. It is this latter sort of abandonment which bears so striking a resemblance to a forfeiture. For in ninty-nine out of every one hundred instances of abandonment by *non user*, the will does not in fact consent.

3. Kent's Com. § 448, 449, 450.

All authorities concur in holding that a right can only be lost by non user, where the non user extends over a period sufficient to vest a title by prescription.

Domat's Civil Law § 1030. 3. Kent's Com. § 448.
Lawrence vs. Obee (3. Campbell 514.)
Corning vs. Gould, (16. Wend. 513.)
Yeakle vs. Nace, (2. Wharton's rep. 123.)

The same principle has been applied by this Court to water privileges on the public lands, and to mining claims.

Crandall vs. Woods, (8. Cal. rep. 136.)
Partridge vs. Townsend et. als. July Term 1858.

The latter case is exactly in point.

The Civil Law in this respect agrees literally with ours. Indeed it seems to be taken for granted, that our law of easements and servitudes was derived from the Roman Law.

Domat's Civil Law § 1030 *et seq.*

The principle has often been applied to offices, and other franchises.

From the various reported cases, the following rule of proceedure may be adduced:

When a man holds a right or franchise of a public nature, and it is alleged that he has abandoned it by *non user*, the fact can only be definitely ascertained and adjudged by a judicial proceeding in which the question is directly involved.

Hardin vs. Page, (8. B Monroe, 648.)

In this case the principle is applied to public offices.

The Alabama and New Hampshire reports also abound in similar cases, but not having the books we cannot make more particular references.

In the case of private rights or easements acquired by location or prescription, if a party seeks to show an abandonment by continued non user, he must plead it, whether he is party plaintiff or defendant.

We may here remark that the principle for which we contend, is generally applicable to all cases where a right once vested, is sought to be divested because of the failure of the party to do something required by law. The defences of the Statutes of Frauds and limitations are familiar examples of our meaning.

We would remark in conclusion, that there was not the slightest evidence before the jury of any *non user* by the plaintiffs. The case of Partridge vs. Townsend, cited above, is a conclusive authority upon this point.

We presume the jury must have been carried away by some such idea; but if so, they acted without evidence, and their action should be rectified.

In Supreme Court,

STATE OF CALIFORNIA.

HARLOW KIMBALL, *et. als.*—Appellants.

VS.

WILLIAM GEARHART, *et. als.*—Respondents.

APPELLANTS' BRIEF.

McCONNELL & NILES, And H. I. THORNTON, Jr.
Of Counsel with Appellants.

Supreme Court
of the State of California

Kimball et al — Appellants

vs

Gearhart et al — Respondents

The grounds relied on by the appellants for a reversal of the judgment in this Case are — 1st Error in ruling out the deposition of Chas R Howe — 2d That the evidence does not Justify the verdict of the Jury, — and 3d Error in giving and refusing instructions —

The first seems principally relied on but is founded entirely on a misstatement of facts So that all we can do in reply is to correct the Statement of facts —

It is not true as Stated by appellant that plaintiffs ~~demurred~~ amended their Complaint at the April Term 1858 — They applied for leave to amend at that term, and obtained it, but for some reason unknown to us they never did amend. The order giving them leave to amend will be found on page 58 of Record.

At the trial of the Cause they filed a paper releasing damages up to a date therein Specified (See Record page 58) but

of Course this could not affect the deposition of Howe as he had no knowledge at the time he gave the deposition that such release would be made

From reading the Complaint one would conclude that the action was intended to be ejectment for the recovery of Water rights and damages for the wrongful detention of the Water, but Counsel Say it is an action on the Case to recover damages for the unwarranted diversion of Water, One of its objects certain is to recover damages for the division of the Water of a Spring Sebastopol Hill—

The Suit was commenced on the 2d day of June 1857, and claims damages for diverting the water from and after the month July 1855

The evidence shows that their ditch was completed to said Spring so as to receive the water from the same Sometime in august 1855

See testimony of Mack Commencing on page 61 of Record

The witness Howe sold out of the ditch on the 19th of July 1856

Then damages are claimed for about One Year of the time while Howe owned one half of the ditch. His right to the damages he did not sell with his interest

in the ditch and could not if he would
Oliver vs Walsh 6 Cal. 456
Under these circumstances he was clearly incompetent by the rule in Packer et al. vs Heaton et al Cal and it is not contended that he would not be if such are the facts
But upon an assumption of facts which never existed and which the record does not show, a very metaphysical agreement is based, to prove that Howe was not interested in the damages at the time his deposition was taken (June 3th 1858)
By a careful perusal of Howe's examination on his voir dire (Record pages from 17 to 28) it will be seen that the circumstances of his connection with the ditch enterprise were about as follows,
In May 1854 Kimball and Howe conceived the project of constructing the ditch described as the Buba ditch, No understanding was then had between them as to what proportion of the ditch, when completed, should belong to each—
Howe gave his personal attention and labor and Kimball furnished all the money that was furnished,
But mostly every thing except what was done by Howe was done on a credit

was at this time as destitute of means as Howe, and Milton could pay in any other way than by selling a portion of their ditch. His Sale of two fifths to Johnson & Hickok was made on the same day and was a part of the same transaction as the Sale of Howe to Kimball, and Kimball Johnson & Hickok all at the same time agreed to become responsible to Howe for that ~~proportion~~ of the Consideration which was to be paid in money, and estimated as aforesaid being equal to the Sum of Seven dollars per day for all the time he had worked and for all the time he might choose to work thereafter, Johnson & Hickok did also then release him from all his liabilities to them incurred on account of the Ditch before that time

There having been no understanding or Contract between Howe and Kimball up to this time as to the proportion each should own in the Concern, the presumption of law is that they were equally interested, and the parties acted upon that presumption when they so estimated it in the deed from Howe to Kimball,

There is no evidence that the interest of either Howe or Kimball was to terminate on the final failure of either to pay his portion of the

expenses nor that the quantity of either of them interest should be regulated by the sum paid into the Concern by either of them,

Howe never did hold his interest under Kimball in any way,

He was the first to discover the water and the route, the first and the last to work upon it. There was no conditions attach to his tenure which might not with equal propriety be said to have attached to that of Kimball, They both acquired and held (title Howe sold out) the same character of title,

It is true that neither of them acquired such a right to the use of the water in dispute as would enable them to maintain an action for the division of it until their ditch was Complete of receiving it

Their ditch was so Completed according to their testimony, in august 1855 Nearly one year after Howe sold out, during all which time Jeffs claim recover damages and have a right to ~~recover~~ for that time, if at all; for there is no question that Jeffs used the water for all that time as they admit~~ted~~ in their answer and claim they had a single right to do having acquired that right long before the first of Aug. 1855

Upon the foregoing State of facts is based the theory of the learned Counsel opposed to us- by which they reason themselves to the conclusion that Howe, at the time of giving his deposition, had no interest in the damages claimed in the Complaint from August 1855 till July 19th 1856,

How does this theory apply to the facts?

A Consideration upon which a forfeiture can be based must be the subject of an express Contract, Here there is no Contract with a Condition either express or implied

An entery by the grantor or feoffor for condition broken implies a great feoffment on Condition, In this Case there is no grant or feoffment on Condition or otherwise, Howe did not derive or hold his title from or under Kimball in any manner Known to the law- Kimball never had any "old estate" in Howes Share of the property, How then Could he "be in as of his old estate"?

But even if Howe had held under Kimball on Condition that he was to pay a certain portion of the expenses, in order to have worked a forfeiture Kimball must

have demanded payment at the precise time it become due by the terms of the Contract and in default of payment, have entered for Condition broken- otherwise the law will presume a waiver of the Condition, Again by taking a Conveyance from Howe and paying him a Consideration therefor Kimball waived and dispensed with any Condition upon which Howe's tenure might have depended (3 Bacon's Abridgment Title Condition)

But for the purpose of making their theory fit the facts of this case the learned Counsel deny that there was any valid Conveyance from Howe to Kimball for want of any Consideration. We think there was a good Consideration, Howe's discharge from their joint liability to Johnson & Hickox for ten thousand dollars, was something very much resembling a Consideration— Seven dollars per day for all the time he had worked when wages were only four dollars (See Mack's testimony p. 61 of Record) might be taken for some part of a Consideration especially when according to the theory of Counsel Kimball was under no legal obligation to pay any thing for his past labor.

But granting there was no Consideration and Consequently no Contract, then, unless there was a forfeiture, (which we have shown to be absurd) Howe was as much interested in the whole property on the day he gave his deposition as he ever was, So that a failure to make out a forfeiture will Compell Counsel to prove the Contract of Conney and from Howe to Kimball valid and founded on a good Consideration before they can take any other position.

Were it Considered necessary we might interpose many more difficulties in the way of the application of the theory of the learned Counsel to this Case,

It may be doubted whether when the grantor enters for Condition broken and is remitted, by fiction of law, to his old title, he Could maintain trespass against a third person for acts which did not affect his ~~title~~, estate, Suppose the grantee had recovered against a trespasser before Condition broken Could such recovery be pleaded in law of an action by the grantor after entery for Condition broken, for the Same acts? Counsel say that in Such Case the grantor Could be

Compelled to account for the damages so recovered, If this be true could he not also on the same principle be Compelled to account for all the rents & profits for the time he went in possession? If the grantor is in as of his old title and the title of the grantee is, for all purposes, as though it never existed, as Contended by Counsel, Could not the grantor, on principle maintain trespass against the grantee for the whole time he was in possession?

To Show the absurdity of the Counsel's theory as applied to this Case, Suppose an attachment had been lived on Howe's interest in Said ditch on the first day of July 1856, and the Suit was still pending on the 19th of July when Howe Sold to Kimball, would Counsel have advised the plaintiff, in attachment, under the circumstances of this Case, that his lien was gone? It certainly would be if a forfeiture had taken place by the entry of the grantor for Condition broken, but who would have thought of defending against the attachment on Such ground, in this Case?

There is a good reason for the failure of all Mesne incumbrances

upon an estate upon Condition. where the estate fails by reason of the entry of the grantor for Condition broken, and this reason is, that Such incumbrances are always taken Subject to the Condition, The grantee can only incumber Such estate as he has, and if it be on Condition the Same Condition attaches to the incumbrances created by him,

But the facts of this case do not require an examination of ~~that~~ the old fictions of the law and we dismiss that branch of the Subject—

The other position assigned to the witness Hoover is that he never had any vested interest in any portion of the property for the reasons that by the original agreement his interest was to be only in proportion to the amount contributed by him to the joint Concern, and that he never contributed any thing and therefore had no interest, In answer to this it is only necessary to say, First, there never was any such agreement and the record will not show it—
Secondly Hoover did Contribute both his labor and credit,

Kimball according to the testimony Contributed little else then credit

But the learned Counsel say that they "refer from Howes statements that the contribution of each was was to be in money or its equivalent in materials, the very object of this Contribution being to employ labourers"

We are unable to see any thing in Howes statements from which to make any such inference. Besides we are too dull to see the distinction taken by the learned Counsel in this connection between the labor performed by Howe and employed labor,

We suppose however that in case Howe had actually performed one half of the labor with his own hands while Kimball employed Sum to do the other half, it would follow from this distinction, so obvious to the learned Counsel, that Howe had Contributed nothing to the labor on the ditch — argal. he had no interest in it!!!

The Second Point made by appellant is that the evidence does not justify the verdict of the Jury -

The main question made to the Jury was, Had plffs done such acts in 1854, as would in August 1855, when they had completed their ditch to the water in dispute entitle them to apply the doctrine of relation and date their right back to the work done in 1854 and prior to the time defts,

actually appropriated the water, admitting that plffs intended to take in this Spring in 1854

The only other question of fact discussed before the Jury was:

Did plffs intend to take up the water of this particular Spring in the 1854 and before defendants, appropriated it?

On both these questions the evidence was Conflicting and there was Sufficient to Sustain a verdict for defts on either.

That Some work was done about a mile and a half below the Spring in dispute, in July 1854 we think it is shown by the testimony of plffs, but whether plffs, ever intended to take in said Spring is rendered extremely doubtful by the following Circumstances, Isaac Baily and J Riley (Record pages 86 & 87) State that Reave said in 1855 that plffs had dropped their ditch down to take in this Spring for the purpose of Selling the water to the miners at Sebastopol, It will be recollected that the Sebastopol deggings were not discovered till the spring 1855, and that this Spring was appropriated by defts as Soon as those deggings were discovered, The testimony of the Same Witnesses (Bailey & Riley) Shows that in Conversation with defts, in 1855 Reave did not pretend that he had marked out the line of ditch So as to take in the Spring in dispute

in 1854, Lee said he had cited through above the ditch whereupon Ward told him to "follow his cites" (page 86). when asked by Ward to point any marks they had made in 1854, he was unable to do so but merely pointed up the hill and said he had cited along there,

The witness Mack on whose testimony plff. rely to prove a location below the spring in 1854, States that at the same time he put up the notices he ~~marked~~ trees along the line and that he had lately pointed out these ~~marks~~ and blazes to Mr James the Surveyor See (Record page 67)

Mr James States that the marks pointed out to him by Mack ~~could~~ must have been made after the Gap stopped in 1855— (Record pages 81 & 82) See also the same subject the testimony of Jr Chase (page 82) and M^c Hatton (page 83) and D. A. Rigby (Page 84) and Thos Passmore (page 85)

Other witnesses for the defendants ~~defendants~~ State that they had examined carefully the whole country in the vicinity of the Spring in dispute in the Spring of 1855, and saw neither notices nor blazes nor any thing to indicate the taking up of this notice before it was taken up by defts, See testimony of Fields (page 85) also of M^c Keatten and Passmore above referred to

As the evidence for the defence is short and very pointed we hope the Court may read it as we are satisfied that it is Sufficient to have justified the jury in finding the following facts

1st That plffs never contemplated taking up the Spring in dispute till after the diggings at Sabatopol were discovered in the Spring of 1855

2d That if plffs did intend in 1854, to take up this water they did not sufficiently manifest that intention until after defts appropriated the Water

3d That defts took up the water in good faith without notice of any intention of plffs. to take it up

4th That plffs. did not follow up what they claim to have been their first acts in 1854, by Such acts as would entitle them to apply the doctrine Relation So as to date their right back to any time prior to the location of defts

5th From the time plffs left off work in 1854, to the time they Commenced in 1855 One year lacking two days, had intervened (See Meeks testimony page 67) Failing to do any thing for Such a length of time was the opposite of that due diligence admitted by plaintiffs instructions to have been requisite in order that

they might apply their doctrine of relation

The Country between their first operation and this spring through brushey was not difficult to dig

It only required one month to Complete the ditch from the starting point to this spring and the testi- shows that pfff, did so Complete it in one month from the time they Commenced in 1855 (July 28th)

It would have been an easy matter for them to have cut the brush on this line in 1854, and we Cannot Conceive how they Could have Surveyed it. So as to Know where it would run and that it would take this spring without Cutting and removing Some portions of this brush which Conrad Says, was "impervious to the foot of man"

It should not be overlooked that the notice of pfff, claim as it appears in the record (page 59) does not Specify the water of this spring

The pfff, ditch was projected, as appears by this notice and the other testimony, to take in "all the branches of one of the Forks of the Cuba River" And it is most probable that this spring affording more than twenty inches of water was not thought of till after the miners at Sabastopol Commenced using it the

great object being to take in a Fork of the Yuba River and its branches

We are referred to the Case of Sawyer vs Weaver for authority to set aside the verdict of the Jury in this Case, All that was decided in that Case was that this Court would not disturb the verdict where there was any evidence to sustain it, That is all we ask in this Case,

This Court will disturb a verdict when the evidence is Conflicting, Read the verdict in this Case even for pltffs. their evidence might sustain it though we do not doubt that the preponderance of evidence is with the defts.

The third error relied on is the refusal of the dist. Court to give the instructions numbered 7, 8 & 9 asked by appellants,

Number 7 was proper refused because there was no evidence tending to show that plaintiffs acquired any right to the water by any thing they did in that year, for by their own showing they could not have appropriated the water before August 1856, and if this right was to be dated back to 1854. it must have been by virtue of the law of relation which had been fully explained to the Jury in the instructions given, It was also bad for the reason that the issue of

"abandonment" had not been made before the Jury either in the pleadings (as contended by Counsel) or the argument to the Jury

It is admitted that the issue of abandonment was not made by the pleadings and that all the evidence was proper under the pleadings

Why then was an instruction on that question required unless it had been claimed by defts that there was such an issue? which was not the fact, The questions made to the Jury as before stated were as to plffs intention to take up the water before defts appropriated it, and if so, had plffs, followed up that intention with due diligence, or such acts as would entitle them to date back their right by relation

Number 8 was properly refused for the reason that it was calculated to mislead the Jury. It was competent for defts to plead prior location and prove it by showing the time of their location and rebutting plffs' location in 1854 by showing that they had not used such diligence as would entitle them to date their right back by relation to that date

All this could be done and was done without raising the issue of abandonment

But we will here remark that we know of no rule which would require abandonment in a case like this to be

pleaded specially, The plffs have not specially set out in their Complaint the circumstances on which they intended to rely to establish their rights And it may well happen that defts proved have no notice of them till they were introduced in evidence—

Suppose plffs had relied on One days work done by them in in 1852 ten miles from this spring, and an expression of their intention, at that time, to take up this spring. No One could learn guess from the Complaint that such facts would be relied on; yet they might as well have been proven under this Complaint as the acts of plffs done in 1854 a mile and a half from the spring— In the Supposed Case might not the defts, prove that plffs had expressly abandoned their location of 1852 without having specially pleaded the abandonment? We think the answer should not be required to be more special than the Complaint in such Case

Number 9, is Subject to the same objections as 7 & 8

Appellants also assign as error the giving of defendants instructions from 1 to 11 but as they have not attempted to point out the error we are not required to notice them

Winchief & Stewart
for the Respondent

Kimball et al — appellants

vs

Gearhart et al — Respondents

Howe could not assign his interest in the damages

Oliver vs Walsh 6 Cal. 456

And being interested in a part of the damages claimed he was incompetent

Packer vs Preston 9 Cal. 575.

Sage vs Stewart 4 Johns. 293.

Supreme Court
of the State of California

Kimball et al — appellants

vs

Gearhart et al — Respondents

The grounds relied on by the appellants for a reversal of the judgment in this case are — 1st Error in ruling out the deposition of Chas R Keene —

2da That the evidence does not justify the verdict of the Jury — and 3da Error in giving and refusing instructions

The first Seems principally relied on, but is founded entirely on a mistatement of facts, So that all we need do in reply is to Correct the Statement of facts —

It is not true, as Stated by appellant that plaintiffs amended their Complaint at the april Term 1858

They applied for leave to amend at that term, and obtained it, but for Some reason unknown to us they never did amend. The order giving them leave to amend will be found on page 58 of Record

At the trial of the Cause they

filed a paper releasing damages up to a date therein specified. (See Record p 58) but of Course this could not affect the deposition of Howe as he had no knowledge at the time he gave the deposition that such release would be made

From reading the Complaint one would Conclude that the action was intended to be ejectment for the recovery of Water Right and damages for the wrongful detention of the Water, but Counsel say it is an action on the case to recover damages for the ~~wrongful~~ diversion of Water, One of its objects certainly is to recover damages for the diversions of the water of a Spring near Sebastopol Calle

The Suit was Commenced on the 2nd day of June 1857, and claims damages for diverting the water from and after the month July 1855

The evidence shows that their ditch was Completed to said Spring so as to receive the water from the Same time in August 1855

See testimony of Mack Commencing on page 61 of Record

The attempt Howe Sold out of the ditch on the 19th of July 1856

Then damages are claimed for about one Year of the time while Howe owned

one half of the ditch, His right to these damages he did not sell with his interest in the ditch and could not if he would. Oliver vs Walpole 6 Leal. 456

Under these circumstances he was clearly incompetent by the rule in Park. Wal. vs Keaton et al Leal: and it is not contended that he would not be, if such are the facts

But, upon an assumption of facts which never existed and which the record does not show, a very Metaphysical agreement is based, to prove that Howe was not interested in the damages at the time his deposition was taken (Dec 30th 1885)

By a careful perusal of Howe's examination on his voir dire (Record pages from 17 to 28) it will be seen that the circumstances of his connection with the ditch enterprise were about as follows,

In May 1884 Kimball and Howe conceived the project of constructing the ditch described as the Bibo ditch, No understanding was then had between them as to what proportion of the ditch, when completed, should belong to each

Howe gave his personal attention and labor and Kimball furnished all the money that was furnished,

But nearly every thing, except what was done by Howe, was done on a credit, extended to them mostly by Johnson & Hickox— They went on in this way without any agreement or understanding between themselves till July 1856, One Year after the Completion of the ditch to the water in dispute, when they got into difficulty with the defendants about this water,

Howe and Kimball were by this time indebted to Johnson & Hickox for means advanced to carry on the work in the Sum of about ten thousand dollars,

On the 19th of July 1856 Howe sold to Kimball his entire interest in the Concern describing it as one half,

The Consideration of this Sale is stated by Howe to have been that he should receive a Sum equal to Seven dollars for each day he had worked on the ditch, that he should be furnished work on the ditch for the future at the Same rate, and that he should be discharged from all liability formerly incurred and particularly from all liability to Johnson & Hickox which was their principal, if not their only liability, For the purpose of discharging this liabi-

=ity it was arranged at the same time that Kimball showed Conway to Johnson & Hickok two fifths of the ditch, for it seems that Kimball was at this time as destitute of means as Howe, and neither could pay in any other way than by selling a portion of their ditch, His Sale of two fifths to Johnson & Hickok was made on the same day and was a part of the same transaction as the Sale of Howe to Kimball, and Kimball, Johnson & Hickok all at the same time agreed to become responsible to Howe for that part of the Consideration which was to be paid in money, and estimated as aforesaid, being equal to the sum of Seven dollars per day for all the time he had worked, and for all the time he might chose to work thereafter, Johnson & Hickok did also then release him from all his liabilities to them incurred on account of the ditch before that time

There having been no understanding or Contract between Howe & Kimball up to this time, as to the proportion each should own in the Concern, the presumption of law is that they were equally interested, and the parties acted upon that presumption when they so estimated it

in the deed from Keene to Kimball,

There is no order that the interest of either Keene or Kimball was to terminate on the failure of either to pay his portion of the expenses, nor that the quantity of either of their interests should be regulated by the sums paid into the concern by either of them

Keene never did hold his interest under Kimball in any way,

He was the first to discover the water and the route, the first and the last to work upon it. There was no Conditions attached to his tenure which might not with equal propriety be said to have attached to that of Kimball, They both acquired and held (title Keene sold out) the same character of title,

It is true that neither of them acquired such a right to the use of the water in dispute as would enable them to maintain an action for the diversion of it until their ditch was ~~complete~~ capable of receiving it

These ditch was so Completed according to their testimony, in August 1855 nearly one year after Keene sold out, during all which time plffs claim damages and have a right to recover for that time, if at all; for ture as

no question that defts used the water for all that time as they admit in their answer, and claim they had a right to do, having acquired that right long before the first of August, 1855.

Upon the foregoing State of facts proved is based the theory of the learned Counsel opposed to us - by which they reason themselves to the Conclusion that Reeve, at the time of giving his deposition, had no interest in the damages claimed in the Complaint from August 1855 till July 19½ 1856.

How does this theory apply to the facts?

A Consideration upon which a forfeiture can be based must be the subject of an express Contract. Here there is no Contract with a Condition either express or implied.

An entry by the grantor or feoffor for Condition broken supplies a great feoffment on Condition. In this Case there is no grant or feoffment on Condition or otherwise, Howe ~~Howe~~ did not derive or hold his title from or under Kimball in any manner known to the law. Kimball never had any "old estate"

in Howes Share of the property. How then could he "be in as of his "own estate"?

But even if Howe had held under Kimball on Condition that he was to pay a certain portion of the expenses, in order to have worked a forfeiture, Kimball must have demanded payment at the precise time it became due, by the terms of the Contract, and in default of payment, have entered for Condition broken otherwise the law will presume a waiver of the Condition, Again by taking a conveyance from Howe and paying him a Consideration therefor Kimball waived and dispensed with any Condition upon which Howe's tenure might have depended. (3 Bacon's abridgment Title Condition)

But for the purpose of making their theory fit the facts of this Case the learned Counsel deny that there was any valid conveyance from Howe to Kimball for want of any Consideration.

We think there was a good Consideration, Howe's discharge from their joint liability to Johnson & Hickok for ten thousand dollars,

was something very much resembling a Consideration — Seven dollard per day for all the time he had worked when wages were only four dollars (See Mackes testimony p. 61 of Record) might be taken for some part of a Consideration, especially when according to the theory of Counsel, Kimball was under no legal obligation to pay any thing for his past labor.

But granting there was no Consideration and Consequently no Contract, then, unless there was a forfeiture, (which we have shown to be absurd) Keene was as much interested in the whole property on the day he gave his deposition as he ever was, So that a failure to make out a forfeiture will Compell Counsel to prove the Contract of Conveyance ~~xxxx~~ from Keene to Kimball, valid and founded on a good Consideration before they Can take any other position.

Were it Considered necessary we might interpose many more difficulties in the way of the application of the theory of the learned Counsel to this Case,

It may be doubted whether when the grantor enters for Condition

broken and is remitted, by fiction of law, to his old title, he could maintain trespass against a third person for acts which did not affect his estate, Suppose the grantee had recovered against a trespasser before Condition broken, could such recovery be pleaded in law, of an action by the grantor, after entry for Condition broken for the same acts? Counsel say that in such case the grantor could be Compelled to account for the damages so recovered, If this be true could he not also on the same principle be Compelled to account for all the ~~rents~~ rents + profits for the time he was ~~into~~ possession? If the grantor ~~or~~ is in, as of his old title, and the title of the grantee is for all purposes as though it never existed, as Contended by Counsel, Could not the grantor, on principle maintain trespass against the grantee for the whole time he was in possession?

To Show the absurdity of the Counsel's theory as applied to this Case, Suppose an attachment had been levied on Howes interest in said ditch on the first day of July 1856, and the Suit was

still pending on the 14th of July when Howe sold to Kimball, would Counsel have acted advised the plaintiff, in attachment, under the circumstances of this Case, that his lien was gone? It certainly would be, if a forfeiture had taken place by the entry of the grantor for Condition broken, but who would have thought of defending against the attachment on Such ground, in this Case?

There is a good reason for the failure of all incumbrances upon an estate, upon Condition where the estate fails by reason of the entry of the grantor for Condition broken, and this reason is, that Such incumbrances are always taken Subject to the Condition. The grantee can only incumber Such estate as he has, and if it be on Condition the Same Condition attaches to the incumbrances created by him.

But the facts of the Case do not require an examination of these old fictions of the law and we dismiss that branch of the Subject—

The other position assigned to the witness Howe is that he never had

any passed interest in any portion of the property for the reason that by the Original ~~contract~~ agreement his interest was to be only in proportion to the amount Contributed by him to the joint Concern, and that he never Contributed anything and therefore had no interest, In answer to this it is only necessary to say, First, there never was any such agreement and the record will not show it—

Secondly Howe did Contribute both his labor and credit,

Kimball according to the testimony Contributed little else than credit—

But the learned Counsel say that they "infer from Howes Statements that the Contribution of each was to be in money or its equivalent in materials, the very object of this Contribution being to employ laborers"

We are unable to see anything in Howes Statements from which to make any such inference,

Besides we are too dull to see the distinction taken by the learned Counsel in the connection between the labor performed by Howe and employed labor We Suppose however that in Case Howe had actually performed one half of the

labor with his own hands while Kimball employed ~~boom~~ men to do the other half, it would follow from this distinction, so obvious to the learned Counsel, that Howe had contributed nothing to the labor on the ditch — argal he had no interest in it!!!

The second point made by appellant is that the evidence does not justify the verdict of the Jury.

The main question made to the Jury was, Had Jeff, done such acts in 1854, as would, in August, 1855, when they had completed their ditch to the water in dispute, entitle them to apply the doctrine of relation and date their right back to the work done in 1854 and prior to the time defts actually appropriated the water, admitting that Jeff, intended to take in this spring in 1854

The only other question of fact discussed before the Jury was,

Did Jeff, intend to take up the water of this particular spring in in 1854 and before defendants, appropriated it?

On both these questions the evidence was conflicting — and

a verdict for defts. on Either
That some work was done
about One mile and a half ~~below~~
below the spring in dispute in
July 1854 we think is shown
by the testimony of plff, but what
plff, ever intended to take in
said spring is rendered extremely
doubtful by the following circum-
stances, Isaac Baily and I Rider
(Record pages 81 & 87,) State that Howe
said in 1853 that plff had ~~dis~~
ped their ditch down to take
in this spring for the purpose
of selling the water to the miners
at Sabastopol, It will be recollected
that the Sabastopol diggings were
not discovered till the spring
1853 and that this spring was
appropriated by defts as soon as
those diggings were discovered)
The testimony of the same witnesses
(Baily & Rider) shows that in
Conversation with defts. in 1855
Howe did not pretend that
~~he did not pretend that~~ he had
marked out the line of ditch
so as to take in the spring in
dispute in 1854, He said he had
Cited through above the ditch
whereupon Ward told him to

follow his Cuts" (Rec. p. 81) when asked by Ward to point any marks they had made in 1854, he was unable to do so but merely pointed up the hill and said he had cut along there.

The witness Mack on whose testimony Pfff. rely to prove a location between the spring in 1854, states that at the same time he put up the notices he hacked trees along the line; and that he had lately pointed out these hacks, and blazes to Mr James the Surveyor &c (Record pp 87)

Mr James States that the hacks pointed out to him by Mack must have been made after the Sap stopped in 1855 (Record pp 81 & 82) See also, on the same Subject, the testimony of Dr Close (pp 82) and McHatton (pp 83) and S. A. Rigby pp 84 and Thos Plummer (pp 85).

Other witnesses for the defendants state that they had examined carefully the whole Country in the vicinity of the spring in dispute, in the spring of 1855, and saw neither notice nor blazes nor any other thing to indicate the taking up of this notice

before it was taken up by defts
See testimony of Fields (page 85)
also of McHatton and Paumore above
above referred to

As the evidence for the defence
is short and very pointed we
hope the Court may read it, as
we are satisfied that it is suffi-
cient to have justified the Jury
in finding the following facts

1st That plffs never contemplated
taking up the spring in dispute
till after the diggings at Sebastopol
were discovered in the spring of
1855

2d That if plffs did intend in
1854, to take up this water they
did not sufficiently manifest
that intention until after defts
appropriated the Water

3d That defts took up the water
in good faith without notice of
any intention of plffs, to take it up

4th That plffs, did not
follow up what they claimed to
have been their first acts in
1854, by such acts as would
entitle them to apply the doctrine
relation so as to date their right
back to any time prior to the
location of defts

From the time

Pelpps left off work in 1854, to the time they commenced in 1855 one year lacking two days, had intervened (See Macks testimony page 67) Failing to do any thing for such a length of time was the opposite of that due diligence admitted by pelpps, instructing to have been requisite in order that they might apply their doctrine of relation.

The country between their first operations ~~operation~~ and this Spring though brushy was not difficult to dig

It only required one month to complete the ditch from the starting point to this spring, and the testi- shows that pelpps did so complete it in one month from the time they commenced in 1855- (July 28th.)

It would have been an easy matter for them to have Cut the brush on this line in 1854, and we cannot conceive how they could have surveyed it so as to know where it would run- and that it would take this Spring with out Cutting and removing some portion of this brush which Counsel say, was "impervious to the foot of man"

It should not be overlooked that the notice of Pfiffs' claim as it appears in the record (page 59) does not specify the water of this Spring

The Pfiffs' ditch was projected, as appears by this notice and the other testimony, to take in "all the branches of one of the Forks of the Guba River" and it is most probable that this spring affording more than twenty inches of water, was not thought of till after the miners at Sebastopol commenced using it the great object being to take in a Fork of the Guba River and its branches

We are referred to the Case of Lavigne vs Weaver for authority to set aside the verdict of the Jury in this Case, All that was decided in that Case was that this Court would not disturb the verdict where there was any evidence to sustain it,

That is all we ask in this Case,

This Court will not disturb a verdict when the evidence is Conflicting, Had the verdict in this Case been for Pfiff, this evidence might sustain it though we do not doubt that the preponderance of evidence is with the defts,

The third error relied on is the refusal of the Dist, Court to give the

Such acts as would entitle them to date back their right by relation

Number 8 was properly refused for the reason it was calculated to mislead the Jury. It was Competent for defts to plead prior location and prove it by showing the time of their location and rebutting plffs' location in 1854 by showing that they had not used such diligence as would entitle them to date their right back by relation to that date.

All this Could be done and was done without raising the issue of abandonment

But we will here remark that we know of no rule which would require abandonment in a Case like this to be pleaded specially. The plffs have not specially set out in their Complaint the Circumstances on which they intend to rely to establish their rights and it may well happen that defendants would have no notice of them till they were introduced in evidence —

Suppose plffs had relied on one days work done by them in in 1852 ten miles from this spring, and an Expression of their intention, at that time, to take up this Spring, No one Could even guess from the Complaint that such facts would be relied on, But they might as well have been proven under

this Complaint, as the acts of pltffs, done in 1854, a mile and a half from the Spring— In the Supreme Case might not the defts, prove that pltffs, had expressly abandoned their location of 1852 without having specially pleaded the abandonment? We think the answer should not be required to be more special than the Complaint in such Case—

Number 9, is subject to the same objections as 7 & 8

Appellants also assign as error the giving of defendants instructions from 1 to 11 but as they have not attempted to point out the error we are not required to notice them

Wanchip & Stewart
for the Respondents

Kimball et al — appellants

vs

Gaskill et al — Respondents

Done could not assign his interest in the damages

Oliver vs Walsh 6 Cal 456,

And being interested in a part of the damages claimed he was incompetent

Packer vs Keeton 9 Leal, 5-71,

Sage vs Stewart 4 Johns 293.

Oct 23rd
PR 307

F

Harlow Kimball etals

vs

William F. Gearhart etals

Record on appeal to
the Supreme Court

Filed Oct 23rd/58

Chas S. Sampson Clk

By Dav. T. Bayley, Asst

1

Complaint

In District Court 14th Judicial District
State of California
County of Sierra

Haslow & Kimball
A. C. Johnson
W. B. Hesketh
Yuba River Ditch Company Plaintiffs
vs
Wm. Genhart
Alonzo Ward
Chas Moore
Geo. W. Fields
W. B. Moore
J. Riley &
Jas Webber Defendants

The Plaintiffs above named by Complaint their Attorneys Spear & Thornton complain in this action of and against the above named Defendants and for cause of Complaint aver - That on or about the month of July 1854 the said Plaintiffs and their predecessors claimed, located, appropriated and became the owners of and took possession of and became entitled to the possession of, and the use and enjoyment of for mining purposes the water and waters flowing and accustomed to flow in a certain Ravine on Sebastopol Hill Flat in Sierra County and State of California. That the Defendants well knowing the premises and contriving and intending to injure the Plaintiffs therein on or about the month of July 1855, unlawfully took possession of the said water and wrongfully and forcibly dispossessed and deprived these Plaintiffs thereof and of the use and enjoyment of the same. And Plaintiffs aver that the said Defendants well knowing the premises but contriving

and intending to injure these Plaintiffs did on or about the month of July 1855. wrongfully and unlawfully divert by means of a ditch or canal the said water from the said Ravine at a point above the point where Plaintiffs ditch was constructed to take and receive the same on the said Ravine.

And Plaintiffs aver. That they the said Plaintiffs and their predecessors were from and after the month of July 1854 and to the time of the committing of the said grievances by the Defendants herein the lawful owners of and in the possession of and entitled to the possession, use, and enjoyment of the said water, and are now and have been since the time of the committing of the said grievances by the said Defendants the owners of and entitled to the possession, use and enjoyment of the said water.

And Plaintiffs aver that since the month of July 1855 or thereabouts the Defendants have been and are now in Complaint
the use possession and enjoyment of the said water and withholding the same from these Plaintiffs.

And Plaintiffs aver. that by the said diversion of the said water by the said Defendants, and by the said withholding of the use, enjoyment and possession of the same from these Plaintiffs by the said Defendants these Plaintiffs have been damaged by the said Defendants in the sum of Three Thousand Dollars.

Wherefore Plaintiffs pray Judgment against the said Defendants for the possession of the said water and for the sum of Three Thousand Dollars for the diversion and withholding thereof. with costs, money disbursements &c

Spear & Thornton
Attys for Plffs

Filed June 20th 1857. Alfred Helm Clk. D.C. Filing
By Geo. E. Tallmadge D. Clk

Answer

In the District Court in the
14th Judicial District in and
for Sierra County of the July
Term 1857.-

Harlow Kimball
A. C. Johnson
W. B. Hickok
Yuba River Ditch Company Plaintiffs

vs

Wm Gearhart
Alonzo Ward
Charles Moore
Geo. W. Fields
W. B. Moore
J Kiler and
Jas. Webber Defendants

Answer

And now come the said Defendants (except George W. Fields and J Kiler) by their then Attorneys Platt & Clark, and for Answer to Plaintiffs complaint say that they deny that the Plaintiffs on or about the month of July 1854 or their predecessors claimed, located, appropriated and became the owners of and took possession and became entitled to the possession of and the use and enjoyment of for mining purposes the water and waters flowing and accustomed to flow in a certain Ravine on Sebastapol Hill Flat in Sierra County and State of California.-

And these defendants deny that they well knowing the premises and contriving and intending to injure the Plaintiffs herein did on or about the month of July 1855 unlawfully took possession of the said water in Plaintiffs complaint alleged and wrongfully and forcibly dispossessed and deprived Plaintiffs thereof and of the use

and enjoyment of the same:-

And these Defendants deny that the said well knowing the premises but contriving and intending to injure the Plaintiffs did on or about the month of July 1855, wrongfully and unlawfully divert by the means of a ditch or canal the water alleged in Plaintiffs complaint from the said Ravine at a point above the point where Plaintiffs ditch was constructed to take and receive the same on said Ravine:-

And these defendants deny that said Plaintiffs or their predecessors were from and after the month of July 1854, and to the time of the committing of the said alleged grievances the lawful owners of and in the possession and entitled to the possession use and enjoyment of said water, and are now and have been since, or ever were before the time of the commission of the said alleged grievances by the said defendants the owners of and entitled to the possession use and enjoyment of the said water:-

And the defendants deny that by the diversion of the said water or by withholding the use enjoyment and possession of the same from Plaintiffs they have damaged said Plaintiffs in the sum of Three Thousand Dollars or in any sum whatever Answer

And these Defendants admit that since the month of July 1855 and for a long period before said day they were in possession of said water, and have been since and now are in the possession use and enjoyment of the same as the well by law may be, and that they withhold the same from the Plaintiffs as they lawfully may do; and these Defendants further answering say and aver, that they are the lawful owners of the water or waters in the Ravine on Sebastapol Hill Flat and that they and their predecessors did in the month of May A.D 1855 (and prior to any location of the said waters by the Plaintiffs) claim, locate appropriate and enter into the possession of, and use and enjoyment of the said water, as by law they might well

do. and that on and in the said month of May AD 1855, on the day of said location of said water by these Defendants the same was vacant and unclaimed by Plaintiffs or any other person or persons, and that they these Defendants had a lawful right to claim, locate, possess, use and enjoy the same. the said water being on Public Lands of the United States, and unclaimed or appropriated at the time: And these Defendants say that they located, used and possessed said water prior to any location of the same by Plaintiffs or their predecessors, And these Defendants say that after the location, claim, use and occupation of said water by them in May 1855 as aforesaid they continued to use and enjoy the same until the 9th day of July AD 1855 when they caused said Water claim to be recorded in the Recorders office of Sierra County in Book "A" of Bank and Water claims on page 110, on the 9th day of July AD 1855, and that they on said day and since said day up to the commencement of this suit, and since, up to the day of the making of this Answer, have been in the use and occupation and enjoyment of said water as they well by law might do, except for about three weeks in the year of AD 1855, when at the solicitation of said Plaintiffs these defendants permitted them to use the saide water and then these Defendants resumed the possession of the same and have ever since held the same. And these Defendants deny that they have injured said Plaintiffs in sum whatever or have deprived them of the use of any water on Sebastapol Hill Flat. that they the said Plaintiffs were the owners of or held any right to whatever to use or occupy or enjoy=. And these Defendants further deny that they withheld or have ever withheld from said Plaintiffs any water on Sebastapol Hill Flat. that said Plaintiffs were the owners of or ever had or now have any right to the use, occupation or enjoyment of;

Answer

And these Defendants further answering deny each and every allegation in Plaintiffs complaint, set forth or herein before specifically denied or admitted

And these Defendants having fully answered the said complaint of said Plaintiffs, pray that said cause as against them may be dismissed, and that they may have judgment for their costs and charges in this behalf expended and that they may have execution therefor

Answer

Platt & Clark
Attys for Defts

Filed July 9th 1857

Alfred Helm Clk D.C.
By Geo C Tallmadge D. Clk

Separate Answer of Georg W. Field

State of California }
County of Sierra } ss

District Court 14th Judicial District Sierra County of the July Term 1857.—

H. Kimball etals }
vs
Wm Gearhart etals }

And now comes George W. Field one of the Defendants in the above entitled cause by his Attorneys Platt & Clark, and for Answer to the Plaintiffs Complaint herein filed says that he is not guilty of the said trespasses in Plaintiffs Complaint set forth or either of them or of diverting or detaining the water or using the same in manner and form as is alleged or in any other manner whatever. Wherefore he prays Judgment. And further Answering he expressly disclaims any right, title, interest, claim or demand of in or to said water right or water in Plaintiffs Complaint set forth, stated or alleged or that he has used the same or any part thereof at any time since the Plaintiffs alleged ditch or canal was completed to the water claimed by Plaintiffs in their Complaint.

This Defendant therefore prays the Court that he may be hence dismissed with his costs in this behalf Expended

George W Field

Separate answer of Georg W. Field

State of California }
County of Sierra } ss

George W Field being first duly sworn deposes and says that he is one of the Defendants in the above entitled cause and that he has heard the above Answer read, and knows the contents thereof and that the same

Jurat

is true of his own knowledge, except as to those things set forth on information and belief, and as to those things he believes them to be true. Jurat

George W Field

Subscribed & Sworn to
before me this 2nd day
of July AD 1857
Alfred Helm
Clk D.C.

Filed July 2nd 1857 Alfred Helm Clk. D.C. Filing

Separate Answer of J. Kiler

State of California } 3rd
County of Sierra } { District Court 14th Judicial
{ District Sierra County
{ of July Term 1857.

H. Kimball et als }
vs
Wm Gearhart et als }

And now comes Jeremiah Kiler one of the Defendants in the above entitled cause by his Attorneys Platt & Clark and for answer to the Plaintiffs Complaint herein filed says that he is not guilty of the said trespasses in Plaintiffs Complaint set forth or either of them or of diverting or detaining the water or using the same in manner and form as is alleged or in any manner Whatsoever. Wherefore he prays Judgment; And further answering he expressly disclaims, any right title, interest Claim or demand, of in or to said water right or water in Plaintiffs Complaint set forth, stated or alleged or that he ever had any right or claim to the same or that he has ever at any time used the same or any part thereof or that he ever was a partner of or engaged or in any manner connected with said Defendant from the time of the Commencement of the trespass and detention alleged in Plaintiffs Complaint, up to the time of the commencement of this suit. Separate Answer of J. Kiler

Wherefore this Defendant prays Judgment of the Court that he may be hence dismissed with his costs in this behalf expended.

Jeremiah Kiler

Jurat

State of California }
County of Sierra } ss

Jeremiah Kiler being first duly sworn deposes and says that he is one of the Defendants in the above entitled cause, and that he has heard the foregoing complaint read and knows the contents thereof, and that the same is true of his own knowledge except as to those things set forth on information and belief and as to those things he believes it to be true.

Jurat

Jeremiah Kiler

Subscribed & Sworn to }
before me this 2nd day of }
July A.D. 1857. }

Alfred Helm
Clk. D.C.

Filed July 2nd 1857

Alfred Helm
Clk. D.C.

Filing

Order overruling New Trial

Kimball etals }
vs }
Gearhart etals }

In the above entitled cause motion for a new trial was overruled by the Court. Order overruling New Trial

I hereby Certify the above to be a true copy of an order of Court in the above cause as entered on the minutes of the District Court.

Ralph Ellis
Clerk District Ct.

Judgment

District Court Lima
County 14th Judicial
District.

Kimball etals
vs
Gearhart etals

And now at this day the above entitled cause having come on to be heard, and the said Plaintiffs as well also the said Defendants as well also the Attorneys being present, a Jury of twelve good and lawful men were duly tried empannelled and sworn to well and truly try the issue joined and after hearing the allegations and proof of the parties Plaintiffs and Defendants, and the Arguments of Counsel and the instructions of the Court, the Jury retired to consider of their verdict and after sometime came into Court and returned the following verdict towit;

We the Jurors in the case of H. Kimball et.als vs Wm Gearhart et.als find for the Defendants

Signed Samuel Merritt
Foreman

Whereupon the same was ordered to be entered on the records of the Court, and it was further ordered, adjudged and decreed by the Court, that the Defendants do have and recover Judgment of and against the said Plaintiffs Healow Kimball Wm B. Hickok, and A. C. Johnson for their Costs in this behalf expended taxed at Three hundred & Eighty five 00/100 and that they do have execution therefor

July th 22nd
A.D. 1858

Endorsed

Filed August 4th 1858

Ralph Ellis Clk D.C.
per Geo C. Tallmadge Deputy

Exceptions of Plaintiffs

Kimball and others }
vs
Gearhart and others }

Be it remembered that on to wit the 20th day of April A.D. 1858 the above entitled Cause being Called for trial, the Counsel for the Defendants requested the Court that there might be a Separate trial of the same for the defendants Geo. W. Field and Jeremiah Kiler and that such Separate trial should precede that trial between the Plaintiffs and the remaining Defendants. To this the Plaintiffs by their Counsel objected and the Court having directed the Separate trial, to proceed as requested by Defendants Counsel, the Plaintiffs then and there excepted.—

Niles Searls
Dist. Judge

Exceptions

Separate Judgment as to Kiler & Field

In District Court 14th Judicial
In District in & for Sierra County of the
April Term A.D. 1858. —

H. Kimball, et.als

vs.

W. F. Gearhart, J. Kiler, G. W. Field et.als

And now the above entitled cause on this day having come on to be heard, and the said J. Kiler and G. Field having in said cause made and filed their Separate answer therein and by their Counsel having asked for a separate hearing, and they having in their said answers denied all trespasses and damages alleged against them in Plaintiffs Complaint, and they the said Kiler and the said Field having in their said answer also denied any and all interest in the matter or the property in dispute, it was ordered by the Court that a jury come whereupon a jury of twelve good and lawful men were duly tried sworn and empannelled, to well and truly try the issue joined and a true verdict to bring into Court, and after hearing the allegations and proofs of the Plaintiffs and Defendants, and receiving their instructions of the Court they retired to consider of their verdict, and after sometime, they returned their verdict into Court as follows: We the Jury in the above entitled cause return a verdict for the Defendants: Whereupon it is ordered and adjudged by the Court that the said Defendants Kiler & Field do have and recover judgment against the said Plaintiffs on the disclaimer

Judgment as to Kiler & Field

Done in open Court April 20th 1858

Niles Searls
Dist Judge

It is ordered by the Court on motion of Counsel for Defendants Kiler and Field that the above and foregoing judgment be entered "Nunc pro tunc"

Done in open Court July 16th 1858

Niles Searls
Dist Judge

Statement for new Trial

District Court 14th Judicial District Siena County

Harlow Kimball A. C. Johnson & W. B. Hickok of the Yuba River Ditch Company

vs

Wm Gearhart Alonzo Ward, Chas Moore & others

Statement

Be it remembered that on to wit the 20th day of June A.D. 1857, in the District Court of the 14th Judicial District in and for the County of Siena before the Hon. Niles Searles District Judge came the said Plaintiffs Kimball and others and impleaded the said Defendants Gearhart and others in a certain plea for the recovery of damages for the wrongful diversion of Water. And the said Plaintiffs then and there filed in the Clerks Office of said District Court their Complaint against the said defendants which said Complaint now on file as of the record in said Cause is hereby referred to as a part of this Statement.

Statement

And be it further remembered that on to wit the 9th day of July 1857 the said Defendants Gearhart and others having appeared to the action of the said Plaintiffs. made answer to the said Complaint of the said Plaintiffs. which said answer now also on file as of the record in said Cause is hereby referred to and taken as a part of this Statement.

Statement

And thereupon by means of the complaint and answer aforesaid, issue was duly and legally joined by and between the said Plaintiffs

and the said Defendants as will appear by reference to the record in said cause as aforesaid.

And be it further remembered that on to wit the 16th day of July A.D. 1858 the said issue so joined as aforesaid came on for trial before the Honorable Niles Searles District Judge of the said District Court, at the Court house of said County in the Town of Downieville, at which time came as well the said Plaintiffs and the said Defendants by their said Attorneys, as also a jury of twelve good and lawful men duly impannelled and sworn to well and truly try the issue so joined by and between the said parties Plaintiffs and Defendants.

Statemen

And be it further remembered that at the trial of the said cause as aforesaid the said Counsel for the said Plaintiffs for the purpose of proving the issue on their part offered in evidence the deposition of Charles Howe which deposition is in the words and figures following to wit:

Statement= Deposition of Chas. R. Howe

Deposition of Chas R. Howe pursuant to a notice and order, on this 30th day of June A.D. 1858 personally appeared before me the Plaintiffs by their attorney and the Defendants by their Attorneys Platt & Clark and Vandeiford & Stewart.

Thereupon Chas. R. Howe being duly sworn on oath deposes and says:

Examined on his voir dire by the Defendants. Questioned by Defendants Counsel:-

Ques= Were you ever an owner in the Yuba Ditch Company and if so, state when you first became an owner therein?

Ans= I was an owner in July 1854 that was the first time I became an owner.

Ques= How long did you remain an owner, until what time?

Ans= Until 1856, I think it was 1856.

Ques= Were you ever an owner in a ditch called the Kimball Ditch?

Ans= I was an owner in it from July 1853 till Augt 1854.

Ques= Where is the Yuba ditch located?

Ans= About one half (½) mile north of the Saddle Back Mountain on the Yuba River side. The Kimball ditch is located on the west side of the Saddle Back Mountain.

Ques= Who did you sell out your interest to in the Yuba River Ditch?

Ans= Harlow Kimball.

Ques= Who did you sell out your interest to in the Kimball ditch?

Ans= It was sold by the Sheriff between myself and Rufus Norvall. I have heard that Obed Fields was the purchaser, or the members of the Galena Company.

X Statement Deposition of Chas R. Howe

X

X

Ques= When did you sell your interest in the Yuba ditch Company?
Ans= I do not recollect the date, in 1856, I think, it is my impression that it was in July.
Ques= What time in July was it?
Ans= I cannot tell certainly whether it was in that month or not, if it was in that month it was towards the latter part of it.
Ques= Did you not sell out in the month of August?
Ans= I cannot say for certain without seeing the date.
Ques What interest in the Yuba ditch did you sell to Kimball?
Ans= We were partners and took up the water, I owned one half of it then, that was what I supposed when we took it up- I sold my whole right there, I could not tell how much I did own for I never had paid a cent upon it.
Ques= Was there not a dispute about the water of the Yuba ditch when you sold out?
Ans= There was about the big Spring near Sebastapol, I made a deed to Kimball when I sold it, I was paid for it.
Ques= How was you paid?
Ans= I was paid by note.
Ques= When was you paid by a note?
Ans= About the first of April 1858, that is between the first and fifteenth of April 1858.
Ques= Did you take any Mortgage or other security at the time you sold to Harlow Kimball?
Ans= I did not.
Ques= How came you to settle and take the note just before the trial in this suit in April 1858?
Ans= I was not able to go on with it, and I told them if they would pay me seven dollars per day I would take it and release them, and have no claim on the ditch.

X

Statement
Deposition of
Chas. R. Moore

X

X

Ques= Who did you make the bargain with at the time you sold your interest in the Yuba ditch?
Ans= Harlow Kimball.
Ques= When he gave the note to you in April 1858 was it not given you for the purpose of enabling you to be a witness on the trial of this case at the April term of Court in 1858? Objected to by Plaintiffs Counsel as leading—
Ans= I suppose it was a part of the object.
Ques= You say you suppose it was a part of the object, now do you not know that it was the object to enable you to be a witness at the trial of this cause at the April term of this Court in 1858,? objected to by Plaintiffs Counsel as leading—
Ans= I cant say for certain, when I was subpoened as a witness on the case I told Kimball I could not be a witness till I was paid up all that was due me at seven dollars a day, clear of all expense, I then told them, if they would give me their notes at three per cent per month payable on or before the 1st day of June I would take it and settle.

Statement of Deposition of Chas R. Howe

Ques= Did they give you their notes?
Ans= They did.
Ques= You say you sold your interest in the Yuba ditch to Harlow Kimball and made a deed to him for it, now who do you mean the words they, gave me their notes?
Ans= I mean Kimball, Johnson & Hickok.
Ques= What obligation was Johnson & Hickok under to make their notes with Kimball to you in April 1858, if you had sold to Kimball all your interest in the ditch by deed in 1856?
Ans= Harlow Kimball sold to Johnson & Hickok two interests the day I sold to him.
Ques= Now why couldnt you testify until you had settled with them? Objected to by Plaintiffs Counsel as improper and irrelevent—
Ans= We never had had a settlement from the commencement

of the ditch, they were owing me about a thousand dollars.—
Question= Would their owing you a thousand dollars
prevent you from being a witness for them?
Ans= I told them if they cashed over or gave me their note
I would have no lien on it, (the ditch.)
Ques= State what your lien on the ditch was?
Ans= The debt they owed me of a thousand dollars. I
told them that I had not any lawful lien upon the ditch
but that I intended to hold on until I got my pay. I told
them that I did not know that I had any lawful lien
upon the ditch. but that I intended to hold on to the
ditch until they paid me the cash at seven dollars a
day clear of all expense, or gave me their note payable
on or before the 1st day of June at three per cent per mon=
th interest. this conversation was last April before the trial
of this case in the District Court.
Ques= Had you not up to that time, April 1858, claimed
your right to hold on to that ditch until you were paid?
Ans= Yes until was settled with.
Ques= Was there any mortgage or other security given
you at the time they gave you their notes?
Ans= There was not.
Ques= Was it not understood at the time you sold your
interest in the Yuba ditch to Kimball in 1856 that you
was to hold on to your right to the ditch until you
were paid as you stated? Question objected to by
Plaintiffs Counsel as leading.—
Ans= It was not understood so at that time, there was
nothing said about it.
Ques= When was it you first asserted your right to
hold on to that ditch until you were paid?
Ans= I always intended to from the time I sold out.
Ques= Did you tell them so at the time?
Ans There was nothing said about it.
Ques= When did you first tell them that you in=

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tended to claim your right to the ditch until you were paid?
Ans= I talked the matter over with Mr Kimball two or three times, and told him I intended to hold my right until I was paid, or got their notes, this was in March 1858, the latter part of March 1858
Ques= Admit you had a conversation with Mr Kimball claiming your right to hold on to the Yuba ditch before the month of March 1858? Objected to by Plaintiffs Counsel as leading and irrelevent.
Ans= I do not recollect of ever having had any conversation of the kind before that time.
Ques=Did you ever have any conversation with Mr Kimball about your right to the Yuba ditch before the Month of March 1858, and after you say you had sold to him?
Ans= I do not know that I did,
Ques= When did you sell to Kimball state month and day of the month?
Ans= I think it was in 1856, but I do not recollect the date.
Ques= Cannot you tell what month it was in?
Ans= I cannot tell whether it was July or August It is my impression that it was in the last of July.
Ques= What do you mean by the last of July?
Ans= I mean between the twentieth and the last.
Ques= Did you not always claim a right and interest in the Yuba ditch from the time you made the deed to Kimball up to the time Kimball, Hickok & Johnson gave you their notes in April 1858, as you have stated?
Ans= No more than what I have stated before, I made up my mind I would hold on to it (the ditch) until I was paid, or settled with by note.
Ques= Did you hold on to it until you were paid,

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or your demand was settled by note?
Ans= That was my intention.
Ques= What was your object in making that deed to Kimball?
Ans= The ditch was a good deal in debt at that time, the Yuba Ditch Company was owing Johnson & Hickok a heavy amount at that time, and they were crowding Kimball pretty hard at that time, Kimball said I would have to sell out my right and title in the ditch, and give him papers to that effect so that he could give a deed of two fifth of it to Johnson & Hickok. Johnson & Hickok objected to buying while I was in the Company, because I had never paid anything, Kimball told me that they would not buy in unless I sold out, I then sold out to Kimball and gave a deed, and that is all. Kimball said that was the only salvation of saving any part of the ditch he thought, & then gave the deed to Kimball. Mr Johnson I believe drew the deed, Kimball gave Johnson & Hickok a deed at the same time I gave him one. There was nothing said by either one of us that I was to have an interest in the ditch, there was no understanding that I was to have any interest in the ditch after the deed was given.
Ques= Now if you made a deed of all your right title and interest in the Yuba ditch to Harlow Kimball in 1856, without any understanding or agreement in writing or otherwise that you was to have no interest lien, Mortgage or incumbrance or right to said ditch and you knew that the same had been deeded to Hickok & Johnson how came you in March 1858 to claim a right in the ditch until you were paid?
Ans= I supposed I had a perfect right & did not know

X

X

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for certain, I thought every man that did work upon the ditch had a right until he got his pay.
Ques= Did not admit your right in March and April 1858 and did not Kimball Hickok & Johnson give you their notes in settlement of your claim?
Ans= No, the second conversation that Kimball and I had. He thought from the way the deed read that I had no claim upon the ditch that I could come upon the ditch for my pay. Kimball said that if there was any such thing he would see, And I should make out my account and we would have a settlement. Kimball looked into it and said I had no lien. They gave me notes as I said.
Ques= What did Kimball say to you in the first conversation you had with him?
Ans= It amounted to the same thing he thought I had no claim upon the ditch from the way the deed was drawn.
Ques= State what was the consideration that Kimball agreed to pay you for your interest in the ditch at the time you say he bought it of you?
Ans= He agreed to clear me from all debts upon it. Some eight or ten thousand dollars and pay me seven dollars a day for my labor from the time they commenced the ditch up to that time, and all other work I might do upon it.
Ques= Were you not after that time a partner in interest with Kimball in that ditch?
Ans= I was not.
Ques= Did you not on the trial of this case April term of this Court 1858, swear upon your voir dire that you sold your interest in the Yuba ditch to Hickok & Co?
Ans= I do not know that I swore to that it was pretty much the same thing. Kimball deeded it to them, and I deeded it to Kimball
Ques= Did you not swear that you sold your interest in the Yuba ditch to Hickok & Co at the April term of the District Court?

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X

Ans= I do not recollect.
Ques= Did you not swear on the trial of this case in the District Court at the April term that the water was in difficulty when you sold to Kickok & Johnson?
Ans= I do not recollect that I did.
Ques= Did you not swear at that trial that you gave Kimball Kickok & Johnson a deed for that ditch property and that you did not get any pay or note and they were to pay you seven dollars per day for the time you had worked?
Ans= I do not recollect that I stated that I gave Kimball Kickok & Johnson a deed. If I swore to that I did not understand the question perfectly.
Ques= Did you not swear on your voir dire on the trial of this case in April last that you had no interest in this ditch until the 19th of August 1856?
Ans= I think I testified to that, but I have since seen the date of the date of the deed and I think it was the 19th of July 1856.

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Ques= What did the Plaintiffs say to you when they came to subpoena you in April when you told them you could not be a witness on account of your interest in the ditch?
Ans= They asked me why, I told them I had never been paid a dollar yet for work I had done on the ditch, and when they had paid me at the rate of seven dollars per day then I could be a witness, and not until then. Kimball and Kickok told me to bring in my account and they would settle it, and they did so.

Every part of the examination, and every question on the voir dire was objected to by Plaintiffs Counsel on the grounds that the same was improper irrelevent and leading.

Cross Voir dire

Ques= Were you in April 1858, or are you now in any way interested in the Yuba Ditch?
Ans= Not in any way, not a particle, not after the deed was made.

Ques= Did you have after the making of that deed to Kimball any interest in that ditch except that the purchase money was unpaid, and due to you from Kimball?
Ans= I had no other interest but that.
Ques= Was that purchase money secured to you by any mortgage or other security or understanding between you and Kimball or between you and any body else further than that you should be paid?
Ans= It was not.
Ques= Was not the deed of the Yuba River Ditch made by you to Kimball, made for the purpose of Kimball's transferring a portion of your interest to Johnson & Hickok for a heavy indebtedness due from you and Kimball as owners of the Yuba River Ditch to them? X
Ans= It was
Ques= Did not Kimball at the time that you transfered to him, transfer two fifths of this ditch to Johnson & Hickok, and did not Johnson & Hickok immediately cancel all the indebtedness due from Kimball and yourself to them? X
Ans= Kimball did transfer two fifths of the ditch to Johnson & Hickok and Johnson & Hickok cancelled the indebtedness. X
Ques= Did you not sell out all your right title and interest in that ditch and transfer it by absolute deed because you were in debt on it and could not go on with it? X
Ans= That was it, I did.
Ques= In whose name on the Yuba River Ditch did the indebtedness stand, and to whom were things charged when they were bought, up to the time of the transfer to Kimball? Objected to by Defendants Counsel.
Ans= I think if I recollect they were charged to Kimball for the Yuba River Ditch, and there was an understanding between myself and Kimball that we were both to be responsible for them. And from the time I commenced it until the time I left it I never paid a dollar upon it, Kimball paid all that X

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was paid, and my share run behind all the time, when we first took the ditch up my share was one half and when it was behind I never could exactly know what it was.
Ques- What did you deed to Kimball?
Ans- One half of the Yuba River Ditch.
Ques- Why did you deed him one half, didnt you deed him a half so as to include and cover the greatest interest you ever had in the ditch? Objected by Defendants Counsel upon the grounds of its being leading and improper?
Ans- That was the reason why the deed was given to cover one half.
Ques- Was it all a part of the same transaction and arrangement that you should deed to Kimball, and that Kimball should deed to Hickok & Johnson as has been described?
Ans- It was. The last question and answer is objected to by Defendants Counsel on the grounds of its being leading.
Ques- Was Kimball to give you in addition to release from all indebtedness on the ditch seven dollars a day for all the work you had ever done on the ditch, and to employ you at seven dollars a day after that time on the ditch?
Defendants Counsel objects on the grounds of its being leading.
Ans- He was to give me seven dollars a day for all the work I had done from the commencement up and should do on the ditch, and was to assume the debts.
Ques- Were you employed after the making the deed to work on the ditch?
Ans- I was.
Ques- Did you receive wages, and if so, who from?
Objected to by Defendants Counsel on the ground of its being leading.
Ans- I did receive wages and from the Yuba River Ditch Co. I was to, but did not draw any pay until we settled.
Ques- Who did you settle with?
Ans- I settled with Kimball Hickok & Johnson the Yuba

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X
X

River Ditch Company.

Ques= Did you get money in that settlement or notes?
Ans= I got notes, one from Kimball and one from Johnson & Kickok.
Ques= You say though, you gave this deed in 1856 you did not receive the purchase money or make a settlement for it with Kimball until April 1858. Now were you not satisfied with that settlement? Objected to by Defendants Counsel on the grounds of its being leading and irrelevent.
Ans= I was.
Ques= When you were subpoenaed to testify at the April term of this Court in 1858 after which time you made the settlement had you not been subpoenaed for several terms previous to that and had come to no settlement with them? Objected to by Defendants Counsel on the grounds of its being leading and irrelevent.
Ans= Yes I was.
Ques= You say that Kickok & Johnson gave you a note at the same time that Kimball gave you his note on the final settlement now explain for what each one of these notes were given? Objected to.
Ans= Johnson & Kickok was to pay for the labor done on two fifths by me on the Yuba River Ditch. and Kimball was to pay three fifths.
Ques= When the deeds were made did Kimball and Johnson & Kickok agree to settle for your labor in this way?
Ans= That was the understanding, Johnson & Kickok were to pay two fifths and Kimball was to pay three fifths.
Ques= In speaking of the dates of these instrument and these transactions, in your examination in chief by the Counsel for the Defendants, did you speak from the best of your recollection, and is your recollection accurate and certain on those points? Objected by defendants Counsel upon the grounds of its being leading.
Ans= I spoke from the best of my recollection, to the best of my knowledge my memory is not very accurate about dates, I am not positive

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Ques= After the making of this deed didnt Kimball Hickok & Johnson always acknowledge their indebtedness to you for your work at seven dollars per day as they agreed when the deed was made?
Objected to by Defendants Counsel upon the grounds of its being leading.
Ans= That was the understanding, and they acknowledged the understanding
Ques= If at the April term of the District Court 1856 you swore you sold your interest to Hickok Co did you not mean to state the same transaction that you have stated in this deposition, was not the sale then referred to, the same that you more fully described in your testimony at that time, and the same that you have described it in this deposition?
Ans= Yes sir, it is the same, I did not understand the question fully at that time.
Ques= If you swore in April that you had an interest in this ditch until the 19th of August 1856, did you not mean to state that you had an interest until the making of the deed from you to Kimball?
Ans= That was it, that was what I intended.
Ques= You say that when you spoke with Kimball about testifying in this case you told him you could not testify until a settlement was had, did you mean that you were legally disqualified by reason of any interest you had in the ditch from testifying, or did you mean, that you wanted them to settle with you before you would testify?
Ans= I told him I wanted him to settle up before I could testify

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X

The examination by Defendants Counsel in chief on the voir dire of the witness and his cross examination by Plaintiffs Counsel on his voir dire was here closed and Plaintiff Counsel proceed to examine the witness in chief in the case as follows:-
Defendants Counsel objected to the examination of the witness on the ground of interest

Examination of the witness

The witness being duly sworn on oath deposes and says as follows:

Ques= Do you know the Yuba River Ditch?

Ans= I do.

Ques= Where is it situated?

Ans= It is situated on the North side of the Saddle Back Mountain in Sierra County and on the east side of the divide.

Ques= How did you first know this ditch?

Ans= I first knew it by taking it up.

Ques= How and when was it first taken up and explain the circumstances of its being taken up?

Ans= The first conversation Mr Kimball and myself had about the ditch was about the latter part of April 1854. We came to the conclusion that we had better go up and look out the route of the Yuba River Ditch, and I went up about the fore part of May 1854. I went up and traveled through on the route to the Bunker Hill Canon What is called now (it had no name at that time) this Canon lies on the east side of Bunker Hill about three miles and a half from Sabastapol. that is as far as I then went. I then returned to Eureka.

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Ques= What conclusion did you come to about the ditch on that trip?

Ans= Mr Kimball and myself came to the conclusion that I had better go up and run out the line of the Ditch.

Ques= What did you then do?

Ans= About the last of May I went up and run a line

Ques= Where did you start from to run the line?

Ans= I started in the lowest sag on the top of the Saddle Back divide.

Ques= What did you do then?

Ans= I run the line.
Ques= What did you do then?
Ans= I stuck some stakes in some places and in some places I did not, but hacked some trees in some places, two hacks on a tree.
Ques= How far did you run that line in that way?
Ans= I run it round to a Canon east of Sabastapol.
Ques= What did you run it with?
Ans= A Spirit level.
Ques= After you had run the line in this way what did you then do, and when did you go?
Ans= I then went back to Eureka I think.
Ques= What did you do at Eureka?
Ans= I told Kimball I had run a line but not a very correct one, but I had taken a Level from one point to another, some places three or four rods and in some places six rods and in some places from ten to twenty rods to a stretch.
Ques= What did you and Kimball then conclude?
Ans= That we had better take up the waters from the Saddle Back round the east fork of the North Yuba River.
Ques= After you concluded to take up the waters what did you then do?
Ans= I told Kimball we had better put up some notices, if he would write some I would go and put them up, I think it was about the first of July I went up and put up the notices.
Ques= Where did you put up these notices?
Ans= On to the big Spring, then to the Canon west of Sabastapol a little.
Ques= How many in all did you put up?
Ans= I think it was three.
Ques= What did you put them on?
Ans= At the first Canon I put one on a tree, at the

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big Spring another one on a tree, the top broken off.
Ques - Was that tree at the big Spring above or below the Spring?
Ans = It was a little below it.
Ques = Where did you put the third notice?
Ans = At the Canon east of Sabastapol.
Ques = When You got through sticking up these notices where did you then go?
Ans = I then went back to Eureka.
Ques = Who wrote these notices we have been talking about?
Ans = Harlow Kimball wrote them.
Ques = At the time he wrote them how many did he write?
Ans = I think he wrote four.
Ques = Did you see and read these four notices?
Ans = I did.
Ques = Did you ever see this notice? (Plaintiffs Counsel here hands the witness a paper taken from the papers on file in this case marked Exhibit "C" in the hand writing of Mr Helm) called a notice signed Harlow Kimball and Charles Howe dated Eureka July 1st 1854 and endorsed on the back with a memorandum of record
Ans = Yes I have.
Ques = State when and where you first saw it?
Ans = At Eureka, the 1st of July 1854.
Ques = Who wrote it.
Ans = Harlow Kimball.
Ques = Was it the same, or different from the other notices written by him at that time?
Objected to by Defendants Counsel because leading and irrelevent
Ans = Pretty much the same thing, very near word for word as near as I can recollect.
Ques = What was done with notice after it was written?
Objected to by Defendants Counsel because irrelevent.

Ans= Harlow Kimball brought the notices to Downieville and had it recorded, I was with him at the time, about the 24th of July 1854.
Ques= What did you see him do with the notices when you got at Downieville?
Objected to as irrelevent by Defendants Counsel.
Ans= I saw him take it to the County Clerks office and had it recorded.
Ques= State what disposition you made of the other notices written at the same time by Kimball?
Ans= Put them up, one at each Canon and one at the Spring as I have before stated.
Ques= For what purpose did Kimball write these notices?
Objected to by Defendants Counsel on the ground that the Notices are the best evidence of the purpose for which they were written.
Ans= To put up on these Canons and the Spring.
Ques= And explain for what other purpose?
Objected to by Defendants Counsel for the same reason as the last question.
Ans= To claim the waters of these canons and Spring.
Ques= Why were four Notices written?
Objected to by Defendants Counsel as irrelevent.
Ans= One was to be recorded.
Ques= How were these Notices written?
Objected to by Defendants Counsel as irrelevent and because the notices are the best evidence themselves
Ans= They were written with pen and ink claiming all the waters from the Saddle back to the East fork of the North Yuba.
Ques= Were these four notices similar to each other or were they dissimilar?
Objected to by Defendants Counsel because the notices

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are the best evidences of their contents.
Ans= They were similar to each other, I read them over as he wrote them, I told him to write them alike, there had been some dispute about notices about town, I think they were very near alike.
Is this paper which was handed you above the same one or a different one from the one you say was recorded by Kimball?
Objected to by Defendants Counsel as irrelevent and leading.
Ans= I think it is the same paper we brought here.
Ques= When did you next go back to the line of the ditch?
Ans= About the 10th of July.
Ques= What did you do up there?
Ans= I commenced operations on the ditch, digging. We put six or eight men to work.
Ques= Where did you put them to work?
Ans= On the Yuba River Ditch on the first Survey on the top of the divide.
Ques= Did you do any work then?
Ans= We did, we commenced and run a correct line around, about ten or fifteen rods and put the men to work upon it.
Ques= How long did you work there?
Ans= I think from five to eight days. We dug from fifty to sixty rods at that time and in running that line around, and in coming back below that line I found by dropping down about seventy or eighty feet, we could take in some five or six Springs, I then went back and told the men that were at work that I believed I would give up that ditch, what we had dug of it till I went to town (Eureka) and consulted Kimball, but they might keep to work till I came back, And thought we would drop below, I explained the matter to Kimball at Eureka, and we agreed

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to drop down eighty feet on the east side of the mountain Saddle Back divide, I then came back took off the men from the upper line of the ditch, I then set them to work cutting brush over the hill where the tunnel would come through the mountain, I then took two men and run a line over the hill, I run the line over the hill from the east side to the west, I then run back again from the west to the east, I then run another line and staked it off, a correct line as near as possible, I then commenced the ditch on the east side of the hill or mountain, I then run the correct line two rods Stretches as near as I could run the line, and put the men to work on it a digging, I then continued the line around to the first Spring about eighty or a hundred rods from the tunnel running east or north east that is as far as I run that day, we stuck Stakes two rods apart the next day we started and run around about half way through the Canon east of Sabastapol, and I think the next day we run around to the Canon, we marked a number of trees on the line putting two hacks upon them, sticking some stakes on the line, then we came back to the Camp at the first Spring. I told Wm B. Mack, the man that kept the books at that time, to write some new notices, he wanted to know how many I told him to write five, he wrote them, similar to those others that I first put upon the upper line, I went and took the old ones down and put up these new ones on the lower line one at the tunnel one at the first Spring at the Camp and one at each Canon and one at the big Spring at Sabastapol about half way between the two Canons, this was in July 1854

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Ques= How far did you prosecute the work that year?
Ans= About eighty rods.
Ques= When did you quit work?
Ans= I think it was in August 1854.
Ques= Why did you quit work at that time?
Ans= We had a good deal of work to do on the Kimball below, We enlarged that ditch that year we made it about one foot wider. We also enlarged the flume

We depended upon the avails of that ditch (the Kimball ditch) to go on with the other, we worked there until late in the fall, (on the Kimball ditch).
Ques= Why did you depend on the avails of the Kimball ditch to go on with the other, (the Yuba River Ditch)?
Objected to by Defendants Counsel because irrelevent.
Ans= Because we had no money to prosecute the work on the Yuba River ditch until we could get it out of the Kimball ditch.
Ques= What were the circumstances of yourself and Kimball? Objected to as irrelevent by Defendants Counsel.
Ans= We were obliged to get every thing done on a credit, we were in poor circumstances and we greatly in debt.
Ques= How many men had you, and how many days works did you do on the Yuba River ditch in that year (1854)?
Ans= One hundred and thirty or forty days works in all and from six to ten men.
Ques= State the reason why you changed the line of the ditch from the upper to the lower grade?
Ans= So as to take in the Springs.
Ques= Which Springs?
Ans= All the Springs from the summit to the Canon east of Sabastapol.
Ques= Which Springs did that include?
Ans= It included what was called the first where we camped and the big Spring at Sabastapol, which was the main Spring for which we let down to the lower line.
Ques= Why did you consult with Kimball about the change of the line of the ditch?
Objected to as irrelevent by Defendants Counsel.
Ans= Because he was the head manager of the concern and I always consulted him about my business we were a going into, and because I knew it was a going to cost

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a good deal to run a tunnel through the hill, the ground for consulting him most was on account of the expense of the tunnel.
Ques= Did the change of the line involve the expense of the tunnel?
Ans= It did, we could not make the change without running the tunnel, the upper line would have required no tunnel but would have run over the top of the ridge.
Ques= When did you return to work on the ditch, When was the next work done on the ditch, (the Yuba River ditch)?
Ans= I think in the last of July or first of August 1855.
Ques= Why did you not work on this ditch during the time from the date you left it in 1854, until you went back in 1855?
Objected to as irrelevent by Defendants Counsel.
Ans= We had a good deal to do on the Kimball ditch to get ready for the next Spring, and we depended upon the proceeds of that ditch to go on with the other and pay off the men who worked on the Yuba River ditch. The men that worked on this ditch all owned claims around Eureka and when the water came in, they went to work in their claims and worked until it dried again which was in July sometime in 1855, that was the reason we did not go on any earlier than that, and also because during the Winter months we could not work the Yuba River ditch on account of the Snow and Storm.
Ques= When you went back in 1855 to work on the ditch what was done?
Ans= We went to work again on the ditch and commenced digging and commenced digging where we left off, and enlarged it from there back to the commencement which was about eighty rods.
Ques= How many men did you have there at work in 1855?
Ans= We had from eight to fifteen sometimes more and sometimes less.

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Ques = How did you proceute that work?
Ans = We went to work by sticking stakes about two rods apart and giving each man a two rod stretch to go to work upon, and set them to work upon it.
Ques = How far did you conduct the work that year, and when did you stop?
Ans = We dug around to the Canon east of Sabastapol, sometime in October, we got through there, that is as far as we got with the ditch that season, that is not much odds of two miles I think.
Ques = What did you with the Sabastapol Spring water when you worked passed it in 1855?
Ans = I turned it in once, I think it was in the last of August or in the fore part of September 1855, that I turned the water of the Sabastapol Spring into the ditch, the water was turned out again, it was turned out by some parties on Sabastapol Hill, I think it was Ward one of the Defendants in this case, about that time Ward told me he would turn it out as fast as we turned it in. I dug on and left a block where the water was a running out over the ditch, through a ditch they had dug to carry it down the hill.
Ques = Was the water ever turned into the ditch again?
Ans = It was after the ditch was completed up to that place, I then sent a man to dig out that block of dirt that was left in the ditch, that the water croped the ditch on to go down the hill, I sent a man by the name of Julian to dig out the block of earth spoken of above, he dug it out and let in the water, there was then a box put in that led the water across the ditch, then there was two boxes put in, about two rods apart the water sometimes run through one and sometimes through the other.
Ques = Did you see any of the Notices that you stuck

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n/p on the lower line of the ditch in 1854. there at any time in 1855?
Ans= I saw them last in the fall of 1854, but did not see any of them in 1855.
Ques= Did you look for them in 1855?
Ans= I did.
Ques= What became of them?
Ans= I do not know, unless they were taken down or washed down by the Snow and Storms of the Winter.
Ques= What became of the three notices that you put up on the upper line of the ditch in 1854?
Ans = I destroyed them or when I took them down.
Ques= Why did you destroy them?
Ans = Because we had put up new notices on the lower line, and thought them useless.

Defendants Counsel objects to the foregoing answer and all testimony given in this deposition in reference to Notices or copies of notices placed or intended to be placed on the line designated by the witness as the upper line because that line of ditch as it appears by the testimony of the Witness would not have reached or interfered with the waters in dispute and because it is shown by the witness that said upper line was abandoned by Kimball and others in the year 1854 and long before the commencement of this suit.

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Ques= Did you see any stakes on the lower line in 1855 that you had stuck in 1854?
Ans I did a number of them along the line up at Spring and now and then one beyond that, I mean the first Spring at the camping ground. I also saw hacks on the trees.
Ques= How far up on the line of the Ditch did you

see either stakes or blazes that you had made in 1854?
Ans- I saw stakes and hacks on the lower line beyond Sabastapol.
Ques- When did you put those stakes and hacks there?
Ans- In 1854, at the time I surveyed the lower line, and put the Notices.
Ques- When did you first survey the tunnel?
Ans- I surveyed it in 1854, the same day I surveyed the lower line of the ditch for the purpose of finding out where to come through the hill on the west side and where the lower line of the survey should begin.
Ques- Did you put any thing on the line of the tunnel at the time you surveyed it?
Ans- I staked it from where the tunnel commenced over the hill to where the tunnel came out of the hill, I surveyed the tunnel and ditch with a Spirit level.
Ques- When was the work on the tunnel commenced?
Ans- I think it was commenced in August 1855.
Ques- How was the work prosecuted and when was it completed?
Ans- I put four men to work on it, two at each end of it. I cannot say for certain it was the last of December or first of January 1856.
Ques- In 1855, when you went to work on this ditch name some of the persons who were up there with you?
Ans- There was Bradford, Jim Dudley, W. B. Mack, and a man by the name of Moore.
Ques- What is the nature of the Country along the line of that ditch?
Ans- It is a very rough Country covered with a thick chaparall
Question- In making your survey of this line of this ditch in 1854 who assisted you?
Ans- James More from the tunnel on to the Spring, the first Spring where we camped, W. B. Mack assisted me afterwards

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Ques= Have you ever seen this map before? Here a map of the ditch in the case was presented to the witness, entitled Map of a section of Kimball Hos. Yuba River ditch surveyed March 23rd A.D. 1858 by S.E. James County Surveyor Sierra County California.
Ans= Yes I have, I recognise it as a very near representation of the ditch and face of the Country, it does not show all the Chaparall.
Ques= Can you point out the section of ditch dug on the upper line and survey?
Ans= I can. Witness points to a line marked A.
Ques= Can you point out the tunnel?
Ans= I can. And points out line marked ditch tunnel.
Ques= Where was it your intention to convey this water, by the Yuba River ditch to, when you commenced it in 1854?
Objected to as irrelevent by Defendants Counsel.
Ans= To Eureka.
Ques= Could this water be conveyed by the Yuba River ditch on the lower line of your survey in 1854 until this tunnel was completed?
Ans= It could not.
Ques= Point out on the map where you stuck up the three notices on the upper line in 1854,
Objected to by Defendants Counsel because the upper line was abandoned in 1854, and is not the line in controversy.
Ans= Witness points out B. C & D. as the points where he placed the Notices.
Ques= How is it that D. falls below the Sabastapol Spring?
Ans= I put it there to claim the waters of that Spring and because I had not run a correct line.
Ques= Would a correct dead level line from the point where you started the upper survey in 1854 have passed above or below this point D?
Ans= I do not know whether it would pass above or below

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it or not, I think it would pass below the Spring, between the Spring and D, nearer the Spring than D.

Ques= Where would a line of the same grade and fall of the Yuba River ditch commencing at this upper survey pass this big Spring?

Statement of Plaintiffs Counsel to witness with map before them in these words, "Examine the line of the Yuba River ditch on the map and point out where the line about which you were asked would pass."

Ans= The witness points out a line just above the Spring marked E.

Ques= You say you changed from the upper to the Lower line in 1854, for the purpose of taking in this big Spring and other Springs, how did you discover after going to work on the upper grade that this change would be necessary?

Ans= From the line that I run past the Spring I found I was twenty or thirty feet above it after I commenced digging that was the first line I run around there.

Ques= Where did you put up the notices you have spoken of on the lower survey?

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Ans= I put one on point F, one on point G, where three trees stood together, one at point H, on a white stub, then a black stub. Now the damned thing has been burned since, and one at point I, and the fifth at D.

Ques= Did anybody live on the line of that ditch in 1854 when you were up there, surveying and working on the ditch?

Ans= No.

Ques= What became of your interest in this ditch?

Ans= Sold to Harlow Kimball.

Ques= When did you sell to him?

Ans= In July 1856.

Ques= What did you sell to him?

Ans= I sold him my entire interest in the ditch.

Ques= Did you have after making that deed any interest in this ditch whatever, or any Mortgage or security on it or have you now?

Ans= I did not, nor have not now.

Ques- When you sold out to Kimball did you give him any instrument in writing to evidence the sale?
Ans- I did, I gave him a deed.

Cross Examination by Defendants

Ques= You say you cut notches in trees on the lower line of the Yuba River Ditch in 1854 above or beyond the Spring in dispute, how many trees did you mark?
Ans= I do not recollect, I could not state.
Ques- How far beyond the Spring was the first one marked with notches?
Ans= There was one or two right beyond the Spring, say five or six rods beyond on the line of the ditch on a straight line about three rods beyond
Ques- What description of trees were marked?
Ans- They were small trees five or six inches through.
Ques= How many notches did you put upon each tree?
Ans= Two.
Ques- Were these notches plain to be seen?
Ans- They were pretty plain, they were hacked into the bark one right above the other.
Ques= How far was it to the next trees that were marked above the ones you have last mentioned?
Ans= I do not recollect of seeing but one, I dont know whether that was made by Mack or not, it was a little different from the others, there was but one hack in it.
Ques= How far up was that above the others?
Ans= Some forty or fifty rods.
Ques = What kind of a tree was that?
Ans - It was a little fir tree.
Ques= Were any notches cut upon a tree at 20?
Ans I dont recollect that there was.

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Ques= How far beyond the spring in dispute did you run the line in 1854?
Ans= We run it round to the east side of Bunker Hill.
Ques= What marks did you make above or beyond the tree you have mentioned?
Ans= Once in a while we stuck a stake where the Chapparall was not too thick, and could see the stake.
Ques= What was the name of that Canon above or beyond Sabastapol?
Ans= I dont know that it had a name at that time we always called it Sabastapol Creek.
Ques What is the name of the Canon beyond Bunker hill?
Ans= I think it is a branch of Clarks Canon, I think it empties into that.
Ques= You say you surveyed to that in 1854 What mark did you make upon that Canon to indicate your survey? Statement Deposition of Chas R. Howe
Ans= We made a hack, in a tree whenever we came to one.
Ques= Did you survey to the Canon beyond Bunker hill in the year 1854?
Ans= I stated that I run a line around to it.
Ques= What mark did you make at the end of the line?
Ans= I dont recollect whether there was a tree marked there or not, or whether there was a stake stuck there or not.
Ques= How far below the spring in dispute on the lower line of the ditch was it to the first tree which was hacked or marked in 1854?
Ans= I do not know that I could state the distance
Ques= How many trees were marked or hacked between the Spring in dispute and the Pacific Ravine?
Ans= I think there was but one, I will not be positive.
Ques= Are You sure there was one?
Ans= I think there was one, but whether a mark made by Mack or not I dont know.
Ques= Why dont you know whether it was made by Mack or not?

Ans- Because there was but one back.
Ques= When did you first see the back?
Ans= I could not tell the exact time, I saw it in 1854, when I was traveling back and forth.
Ques- Did you see Mack make the mark?
Ans= I dont know that I did; I dont recollect that I did.
Ques= Description of a tree was it, state its size and kind?
Ans= I think it was a fir tree, I would not be positive whether it was a pine or a fir, the tree I should think was about two feet through it might be a little smaller, or perhaps larger.
Ques= Which was the greater distance from this tree to the Spring in dispute, or from this tree to the Pacific Ravine?
Ans= I should not think there would be much differance but it might be a little further to the Spring in dispute.
Ques= Does this tree stand above or below the ditch as now dug?
Ans= I think it stands above, I am sure it does probably from five to six feet above the ditch.
Ques= How many trees were marked or hacked upon the line of the ditch as now dug in 1854 between the Pacific Ravine and the Springs at the Crimea Cabin?
Ans= I cannot tell there might be six or eight of them or there might have been more or there might have been less. but I dont think was any less.
Ques= Are you sure there was one?
Ans= I am sir.
Ques= How far was the first one from the Pacific Ravine?
Objected to by Plaintiffs Counsel because indefinite and uncertain, and not putting the witness upon answer about any identified tree so that he could know about what he was questioned.
Ans= The one that I was positive about was between the Alma and the Crimea nearest to the Alma Company, there was two or three along there marked one of them I saw Mack mark he cut the limbs off of one, so that I could see the staff that

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he had through the brush, he had one staff and I had one.
Ques= You say you put up three notices in the first place on the upper line, written by Kimball, and that after you changed the line and dropped down you put up five similar notices written by Mack, what did you do with the three notices you first put up, when you put up the last notices?
Ans= I tore them down and destroyed them.
Ques= What was your reason for doing so?
Ans= I wanted to put up one or two notices more and I wanted to have them all in one hand writing or else I should have put them up again.
Ques= Are you sure you took down the notice on the upper line at the Pacific Ravine?
Ans= I positive of it.
Ques= Are you as sure of that as any other fact you have stated in this deposition?
Ans= I am.
Ques= Was there no other notice put up on the upper line at the Pacific Ravine after you took that one down?
Ans= There was not.
Ques= Was it the only reason you had for taking these notices down and destroying them because you wanted all the notices in the same hand writing?
Ans= I wanted to put a notice on the first spring at the camp and one at the tunnel, and I wanted them to all read alike as near as possible and in the same hand writing.
Ques= What was the difference in the reading of those notices put up on the upper line, and those which you afterwards put up on the lower line?
Ans= I dont know that there was much difference, there could not be much difference, there might have been a few words difference and there might not have been any difference the import was the same claiming the same water.
Ques= Did not the first notices put up claim all the waters to the Buttes?

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Ans- They did not, they claimed around to the east fork near the Buttes.
Ques- Did you claim by your notices all the waters of the north fork of the North fork of Yuba River?
Ans- All that are croped by the line of the ditch
Ques- Did you also claim the waters of the East Fork of the North fork of the North fork?
Ans- That was the intention.
Ques- How far is it following the grade of the ditch from the starting point at the tunnel to the point on the east fork near the Buttes where the ditch will terminate when completed?
Ans- I never measured it, but from traveling over it I should call it twenty five miles.
Ques- You say, you left the Yuba River ditch in August 1854, to go to work on the Kimball ditch, Now who at that time were the owners of the Kimball Ditch?
Ans- Kimball, myself and Kimballs son and I believe Rufus Nowall claimed to have an interest in it.
Ques- Did Rufus Nowall have an interest in it at that time?
Ans- I dont think he did
Ques- Why do you not think he did?
Ans- In 1852 he and I entered into partnership in December of that year, the partnership was a verbal one, We agreed to work together for one year, I made such an entry on my book of memorandums, he worked with me two days I think, that is all we ever worked together he went off prospecting about Galena hill and Forest City, he took up some claims at Forst City, and worked them a spell on them and then sold them, he sold one of them I think for three hundred dollars, the other one I think for sixty or seventy I dont recollect which, he used the money without any of my knowledge, or saying anything to me about it one way or the other, this is the year we were in partnership 1853. he then went to Cox's bar and bought a claim there, and was to pay twelve hundred dollars for it. I think that was it.

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I think he borrowed the money to pay for it. he kept it spell I dont know how long, a month or six weeks and then sold and whatever he got for it I never knew, he then came up to Eureka, and took up another claim, I think he went in with a man by the name of Sprowle instead of taking up a claim, and was to have a share of the claim I dont know how much of it. I dont know whether he ever worked in the claim or not they sold it in a short time after Norvall went in, he never said any thing to me about the money he got for it, he went off then to Rabbitt Creek and Gibsons and spent the money the money and never said any thing to me about it. When he came back he came to me and wanted to sell his interest in the ditch, I believe he offered it to me, and I told him I did not think he had any interest in it, this was I think in the Summer of 1854, he swore he would have it, and commenced a suit for it, and won it by proving a three years partnership there never was any such understanding between him and me, I have since found the book containing the memorandum of the agreement, that is the reason why I did not consider him a partner.

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This question was objected to by Plaintiffs Counsel because it is irrelevent and because it is not proper in cross examination of the witness.

Ques= What streams of water did the Kimball ditch or appropriate?

Ans= The Saddle Back Creek and its tributaries.

Ques= You say that Kimball and yourself were very much involved in debt when you quit work on the Yuba ditch in 1854, were you not involved in debts when you commenced the Yuba ditch in 1854?

Ans= We were, we were not as heavily in debt in the fall as we were in the Spring, we had sold water and paid off some of our debts.

Ques= Had you not involved yourselves in debts in

conetructing the Kimball ditch for the purpose of appropriating the waters of Saddle Back Creek and its tributaries?
Ans= We had some I don't know how much, we had paid up the most of it to the men from the avails of the ditch, that year I think Kimball paid the men off every Saturday night.
Ques= You stated that you were indebted in 1854 when you commenced the Yuba River ditch, I asked you if that indebtedness did not arise out of the conetruction of the Kimball ditch, will you be kind enough to answer the question which I asked you?
The form of the question objected to as improper by Plaintiffs Counsel.
Ans= I think it did, in the month of July 1854 we reached the Saddle Back Creek, that was the reason that Kimball paid off the men every Saturday night, I think the most of the men were paid off for labor done on the Kimball ditch at that season some six or eight of the old hands he might not have paid off.
Ques= In what did that indebtedness consist?
Ans= It consisted of labor, and provisions, tools, and Black-smithing &c.
Ques= In the conetruction of what work were these articles you have mentioned used?
Ans= In digging the Kimball ditch.
Ques= How much was the indebtedness state to the best of your recollection?
Ans= I have no idea it might have been five hundred or it might have been a thousand, or it might have been more than that dollars or less I dont know.
Ques= How many men do you say worked on the Yuba River ditch in 1854?
Ans= From six to ten sometimes more and sometimes less.
Ques= Who were they, give their names?
Ans= Patrick Moore, James Moore, James Dudley, Wm Dudley

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Michael Young, and a man by the name of Murry I think, and Mack was one, and myself, and there was one or two others I think.

Ques= You said they worked some hundred and thirty or forty days, how much did you pay them a day?

Ans= They did perform some one hundred and thirty or forty days work I mean in all, not one man. We paid them five dollars a day. I think that was what Kimball agreed to pay them.

Ques= Did you run the upper line round to the Canon east of Bunker Hill?

Ans= I did, or we did.

Ques= Did You mark trees on that line?

Ans= I think we did some it was not our correct line.

Ques= You say you dropped down from the upper line to the lower line of the Yuba River ditch principally for the purpose of taking in certain Springs of which the one in dispute is most important, and that you put a notice on a tree a short distance below the last mentioned Spring in 1854 to signify your intention to claim the same was this notice written on such material and placed in such a position as would be likely to remain there during the winter season?

Ans= It was written on paper and put up with pegs, the notice was put on the tree next to where the water run down the channel, the pegs were wooden.

Ques= Did you make any other marks upon the Spring in dispute or the Stream leading from it in 1854, to indicate your intention to appropriate the same?

Ans= I dont know whether I did or not. I dont recollect now.

Ques= Suppose a person followed up the Stream in dispute from the Yuba river to its source in the fall of 1854 what indication of an intention to appropriate it would be have found, so far as your knowledge extends besides the notice spoken of?

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Ans- I do not know of any except the two trees hacked which I have beforementioned in this deposition, and which stand about three rods beyond the Sabastapol stream and are now cut down.
Ques- What was the size of these trees?
Ans- From five to eight inches through. one of them might have been a little larger.
Ques. Were they above or below the ditch?
Ans = They were above.
Ques = How far above the ditch?
Ans = From four to ten feet.
Ques- You say you went back the last of July or first of August 1855 to work upon the ditch, What time in 1855 did you go to the Spring in dispute?
Ans = I cant say for certain, within three or four days we went back, if I am not mistaken. I think it was the fourth day, that is my impression.
Ques- Did you at that time find the notice on the tree below the Spring?
Ans = I did not.
Ques = Did you find any body using the waters of the Spring?
Ans = I think they were using it. I dont know what time the water was taken out of the channel.
Ques = Who were using it?
Ans - I think Ward and Webber that Company in fact I dont know whether they were using it. it was running through their ditch, by their Cabin.
Ques = How far was it from where you left off digging in 1854 to the Spring in dispute?
Ans = I always called it a mile and a half it might not have been more than a mile, I never measured it.
Ques = Was there not a great deal of timber and brush between the Spring and where you left off digging in 1854?

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Ans= There was a great deal of it, there was thick Chapperall.
Ques= Could a person any where from the stream in dispute see your ditch from the condition you left it in, in 1854 I mean from any point as far down as you have been on the Stream?
Ans= I dont think they could.
Ques= Could a person at the time you quit work on the lower ditch, standing in the trail where the upper ditch crosses the divide have seen the lower ditch?
Ans= When they, or you first get on the divide, they or you could see some five or six rods of it from the trail, there was no Chapperall there to hide it, about twelve or fourteen rods further on another strip of it could be seen, about forty or fifty rods above that quite a long strip of it could be seen.
Ques= You say you commenced in the last of July or first of August 1855 to renew the prosecution of the ditch, what time did you get the ditch completed to the Spring in dispute?
Ans= In the month of September 1855.
Ques= Did you have any conversation with Mr Alonzo Ward and Mr Kiler in August, September or October 1855 at Sabastapol hill?
Ans= It is my impression that I did, I am not positive.
Ques= Did you not State in that conversation that you had not Staked, nor leveled, nor posted notices on the lower line of the Yuba River ditch in 1854, as far up as the Spring in dispute?
Ans= I told them I think I had never run a correct line, with regard to notices I have no recollection of saying about them.
Ques= Did you not tell them that you had stuck no stakes so far up or on the Spring in dispute?
Ans= I have no recollection of telling them that.

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Ques= Did not Mr Ward tell you in that conversation if you would show him any stakes, or marks indicating an intention to appropriate the Spring that he would abandon his claim and let you have the water?
Ans- I do not recollect any such conversation.
Ques= In this same conversation did you mention the hacks on the two trees which you have described as being about three rods beyond the Spring?
Ans= I do not recollect that I did.
Ques= Did you not during the year 1855 have several discussions and disputes with Ward and others of his Company about the right to the waters of Sabastapol Spring?
Ans= We did about that, and the right to go across their claims.
Ques= Did you in any of these conversations and discussions mention the marks or hacks on the two trees near the Spring above referred to?
Ans= I did not to my recollection.
Ques= Did you have a conversation in the Fall of 1855 with Mr Ward in the presence of Mr Bailey in reg and to the Yuba River ditch?
Ans= I do not know whether I did or not. I do not know that I know Mr Bailey.
Ques= Did you say to Mr Ward in the Fall of 1855 in the presence of Mr Bailey or any other person, that you had not in 1854 run the line upon which the ditch is now dug to Sabastapol Spring?
Ans= I do not know that I did I might have told him I never had run a correct line.
Ques= Did you not tell him that you had not staked that line to Sabastapol Spring?
Ans= Not to my knowledge.
Ques= Did you not tell Mr Ward about the month of September 1855 in the presence of Mr Bailey or any one else, that the line of

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ditch which you had run went above the Spring in dispute but that you afterwards dropped down when gold was discovered on Sabastapol flat to make mines buy water of you?
Ans= Not to my knowledge, I think no such conversation ever passed between us.
Ques= Do you know Mr Dodson?
Ans= I do.
Ques= Did you not tell him in 1855 while you were engaged in constructing the Yuba River Ditch below Sabastapol that you only run the survey as you dug the ditch and no faster?
Ans= I recollect of having had a conversation with Mr Dodson, I dont recollect the whole conversation we had it was something in regard to the line, I told him I did not run the correct line any faster than we went along, that is it, if I recollect aright, I do not recollect the whole conversation we had.
Ques= How many men worked on the ditch in 1855?
Ans= I am not positive, but I think from ten to fifteen.
Ques= How long did it take you with that number of men to complete the ditch from where you left off in 1854, to Sabastapol Spring?
Ans= I should think it was not much odds of a month it might have been a little longer.
Ques= At the time you located this water did you not intend to convey it to Monte Cristo?
Ans= It was talked of before and after we dropped down, I do not know whether it was settled upon or not.
Ques= When did you finish abandon the idea of taking it to Monte Cristo?
Ans= We found that the Springs in the fir Cap mountain were taken up, I run a line to see where it would come out at Monte Cristo and found that Havens had claimed the Spring at the fir cap, I then abandoned the idea of taking the water to Monte Cristo.
Ques= What time did you run that line?
Ans= I am not positive at what time I run the line, it was at the time we were doing the first digging on the Lower line, and soon

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after we commenced there.
Ques= You say the reason why you could not go to work earlier in the season in 1853, was because the hands who worked the ditch had mining claims that they were working, why could you not have hired other men?
Ans= Because we had not the cash to hire them with. All these old hands that had claims there, wanted to go to work on the ditch when water failed, and take their pay in water or money at their option at the next season. Kimball hired these hands on a years credit.
Ques= Did not those notices which you have described as having been written by Mack and placed on the lower line in 1854, claim the waters referred to in them to convey to Monte Cristo, or for the purpose of conveying to Monte Cristo?
Ans= I think not I dont recollect of seeing anything of the kind.
Ques= Are you positive that they did not claim the water for the purpose of conveying it to Monte Cristo?
Ans= I am not positive.
Ques= Was not that one of the reasons why you took down the notice on the tree a short distance below Sabastapol Spring and destroyed it and put up another in the same place, because the first notice claimed the water to take to Eureka and the one you put up in its place claimed the water to take to Montecristo?
Ans= It was not, I think that neither of the Notices had any thing to say about Monte Cristo.
Ques= At what stream if at any does the upper end of the ditch terminate as far as it is dug?
Ans= It terminates at Bunker Hill Spring.
Ques= How much farther is it intended to be dug when completed?
Ans= To the waters of the Middle and East forks of the North fork of the North fork of the Yuba River, the distance would be about twenty four miles.

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Ques- When did you do the last work on it extending it towards the east fork?
Ans= In the year 1856, I think.
Ques= At what time in the year 1856 did you quit work?
Ans= In the last of October or first of November I think I am not positive.
Ques= Is the line of the Ditch marked out above the upper end of the last digging so that it can be traced by such marks?
Ans= It is marked for about two miles in this distance there are some six or eight trees marked.
Ques= Are they distinctly marked so that they can be found?
Ans= They are, I think there is two hacks in each tree, I told them to put in two, there was one tree that I marked as we passed round the point of the hill, a cedar I think, a cedar it must be or a pitch pine, that stood on the top of the hill, near where the ditch will cross it, I marked it with my jack knife on four sides.
Ques= When was this done?
Ans= In 1854.
Ques= You say you commenced the Yuba River ditch in 1854, how much of the ditch upon the line upon which it is now dug was dug in 1854?
Ans= Some seventy or eighty rods.
Ques= How much was dug in 1855?
Ans= I called it a mile and three quarters.
Ques= How much was dug in 1856 in addition to what was dug in 1855?
Ans= One mile and thirty rods.
Ques= How much of the ditch was dug in 1857?
Ans= It was not extended any further a head.
Ques= How far has it been extended on in 1858?
Ans= Not any
Ques= How much yet remains to be dug?
Ans= About twenty four miles.

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R E Direct Examination

Ques= What was done on the Yuba River ditch in 1856?
Ans= It was dug from the Canon east of Sabastapol round to the Bunkerhill Spring one mile and thirty rods.
Ques= What was done in 1857?
Ans= The ditch cleaned out and the flume repaired.
Ques= Was that a difficult or an easy job?
Ans= It was not an easy job or a very hard one, there was a considerable work to do, there was a good deal of fluming to build up and repair.
Ques= Where does the usual trail going from Sabastapol to Eureka cross the divide in relation to this ditch?
Ans= There was none in 1854 after commencing the ditch at the top of the divide then the trail commenced at the commencement of the ditch, and followed the bank of the upper ditch as far as it ran and went around on about the same line to Sabastapol.
Ques= When did the indebtedness on the Yuba River ditch accrue?
Ans= From 1854 to 1856.
Ques= How was this five dollars a day which you said was paid by Kimball to the hands on the Yuba River ditch in 1854 paid?
Ans= Paid in money and water the following Spring.

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Cross Examination renewed

Ques= Was there any trail from any point to Sabastapol in the Spring of 1855?
Ans= I think not until I cut out the road around the Side hill, I have spoken of, that was I think in 1855.

Chas. R. Howe

Certificate

State of California }
County of Sierra }

I, Louis Bartlett, Notary Public, duly appointed and commissioned in and for Sierra County and State of California do hereby certify that the foregoing deposition of Charles R. Howe, was taken before me, commencing on the 30th day of June A.D. 1858, at three O'clock P. M. of that day and continuing from day to day until completed. The examination of said witness was adjourned from time to time by consent of parties Plaintiffs and Defendants said deposition was reduced by me to writing at my office in the town of Downieville at the County and State above stated, that the same was carefully read over to him the said Charles R. Howe, and he being first duly sworn by me signed the same in my presence, it first being corrected in every particular desired by him. Statement Certificate

This deposition was taken as above stated upon the affidavit, Order, and Notice hereto appended.

In witness whereof I have hereunto set my hand and affixed my Notarial Seal on the 2nd day of July A.D. one thousand eight hundred and fifty eight

Louis Bartlett
Notary Public in & for
Sierra County

Statement. Exceptions

To the introduction of which deposition the Counsel for the Defendants then and there objected because of the alleged interest of the deponent Charles Howe in the result of the suit. For the purpose of establishing said interest they read to the Court from said deposition of the said Howe the Examination of him the said witness on his "Voir Dire." And also gave in evidence a deed of Conveyance from the said Charles Howe of all his right title and interest in the so called Yuba Ditch to one of the Plaintiffs, Harlow Kimball, dated the nineteenth day of July 1856.- And in addition to the complaint and answer it also appeared from the minutes of the Court that at the April Term 1858 the following order was made to wit

Statement Exceptions

Kimball et als vs Gearhart et als = On motion of Plaintiffs Attorneys- It is ordered that Plaintiffs have leave to Strike from their Complaint their claim for damages previous to July 18th 1856. But the Court sustained the Defendants objection to said deposition whereupon the Counsel for the said Plaintiffs then in due form of law excepted, and insisted before the said Court that the said Charles Howe was a good and Competent witness, and that the said deposition ought by law to be admitted in Evidence ——

And the said Plaintiffs with a view to render the said deposition admissible in law, then and there in the words and figures following remitted and released to the said Defendants all claim and demand for damages accruing prior to the first of August A.D. 1856. ——

Viz-

"Kimball and others vs Gearhart and others" } District Court 14th Judicial District Sierra County-

"The Plaintiffs in the above entitled "cause hereby release and remit to the said Defendants in "said cause all claim and demand for damages contained

"in their complaint for the whole of the month of July exp. to the "first day of August AD 1856"

(Signed) Kimball & Co by their Attys W. T. Thornton Jr and J. R. McConnell

Which said release and remittur was then and there duly filed among the papers of said cause= She said Plaintiffs also moved the Court for leave to amend their said Complaint by striking out of it all claim and demand for damages previous to the first day of August 1856= The Counsel for the said Plaintiffs then offered again to read the said deposition in evidence, but the Counsel for the Defendants objected, and the Court having sustained their said objection, the Counsel for the said Plaintiffs then and there in due form excepted, insisting to the said Court that by the law of the land the said deposition ought to be read in evidence for the said Plaintiffs= Statement Exceptions

And be it further remembered that on the trial of the said Cause the Counsel for the said Plaintiffs for the purpose of proving the issue on their part introduced the following notice the same having been previously identified by J. Webb Nicholson a witness called for the said Plaintiffs as having been brought to him for record.

Notice

To all men. That we Harlow Kimball & Charles Howe of Eureka, North Sierra County California do take up and claim all the waters commencing on the East side of the Saddle Back Mountain & running so as to take in all the branches and forks of the north fork of the north fork of the Yuba River and on the east fork near the Butte Mountains to convey to Eureka for mining purposes in a ditch four feet on the bottom, three feet deep and six feet wide on the top.

Eureka July 4th 1857. E Harlow Kimball
Charles Howe

Notice Claiming Water

And the Counsel for the said Plaintiffs for the purpose of proving the issue on their part introduced the Maps hereto annexed as a part of this Statement marked Exhibit " "

We agree that both of the original maps used at the trial of this cause be sent up for use in the Supreme Court

Thornton & McConnell
Platt, Vanclief & Stewart Counsel for Deft

And the Counsel for the said Plaintiffs for the purpose of further proving the issue on their part introduced the following evidence, which in addition to the foregoing is the whole of the evidence introduced and relied on by them. Viz;

Kimball et als
vs
Gearhart et als

Testimony in the above entitled Cause

Statement

J. Webb Nicholson being duly sworn deposes and says- I was recorder of Siuna in 1854. have testified before in this case- says this Book of record is a copy of the one in which the notice was recorded, recognise the Notice as being the same I recorded July 23rd 1854.

Testimony of J. Webb Nicholson

Defence objects to this Notice, first because it is irrelevent 2nd because it does not appear that it was ever made public in any manner whatever 3rd because it does not appear that Defendants or their predecessors ever knew of its existance 4th because there is not law entitling such a paper to record= Objections overruled= and Exception to.

Objections

Notice marked Exhibit "C" introduced as testimony

W. B. Hickok

being duly sworn says Mr Moore (whose deposition is here introduced) told me he was going to Frazer River. heard of him at San Juan- also at San Francisco-

Testimony of W. B. Hickok

Testimony of W. B. Mack

W. B. Mack being sworn deposes and says. I know the Plaintiffs in this suit resided at Eureka since October 1852 - have known Kimball since 1852 have known Johnson & Hickok since 1853 Yuba River Ditch is situated on the S. E. of Canon Creek and Yuba River first knew the Ditch 1st of July 1854. first of July 1854. Howe and myself were on the east side of the mountain Howe pointed it out to me we were surveying a small ditch. On the 10th of July we went up and went to digging on the ditch he had pointed out to me. Mr Howe, James Moore, M. Young, James Donnelly Wm Donnelly B Moore went with me at the time, went to digging the ditch - recognises the map as a correct representation of the ditch - worked about a week on the upper ditch then we fell below 72 or 73 feet and went to work on that ditch we found by keeping up we could not take in the Crimea and Sabastapol Springs - Howe and myself were working four or five days on the upper ditch we were setting grade stakes ahead of the workmen we stopped in the middle of the after noon said he would not set any more stakes on that grade till he saw Kimball. He went down that evening Kimball was living at Eureka City. Howe came back the next day - went to see Kimball because he would have to fall 70 or 80 feet to take these Springs in and could not do so without seeing him, the object of this ditch was to carry water from the head of Canon Creek to Eureka. In falling 70 or 80 feet we would have to construct a Tunnel. could not take the water over the ridge - commenced digging at or near the tunnel when we dropped down - the Tunnel was surveyed by Howe, did not see him when he did it saw the stakes he had stuck this was about the 15th of July, commenced digging the ditch on the lower grade about the 16th of July - run out the ditch - commenced digging near the Crimea Spring the hands were working during

Statement
Testimony of
W. B. Mack

this time, the distance from the Spring was about half a mile this ditch was run with a Level and staff= Howe carried the Level & the staff - blacked the trees to mark our course - also stuck stakes when there were no trees to mark. The line we marked runs along about where the ditch is marked on the Map= I wrote five Notices the day before - Howe put them up along the line - put one up on a tree near Sabastapol Spring = first conversation between Howe and Myself about notices was when at our Camp a day or two before we run the line - he requested me to write five Notices he worded them to me, I wrote the Notices = think I wrote five - they were put up by Howe along the line. Howe showed them to me as we run the line - first one was on a tree marked G - on the map another H. on the map I & another marked D. did not see them again till 1855. did go along till then - saw the trees the notices were on. did not see the Notices did not look for them - it was about from the time they were put up - think the snow would effect the notices. it falls ten or twelve feet on the level - was about fifty feet from the Stick on which one of the Notices was put - was put up with wooden pegs - some were on the side next to the ditch, were put about as high on the body of the trees, as a mans head, never have seen any of these notices since - These notices claimed the waters of the North Fork - East Fork of the North Yuba and all its tributaries or intermediate streams, to be conveyed to Eureka for mining purposes - then staked the size of the ditch These were put up 16th day of July - Commenced digging on the lower ditch the day before - Worked by the day - by stakes set two rods apart worked that time about half a mile - I kept the books for the Laborers - Work done was Seventy six days at four dollars per day and twelve days at seven dollars per day - Howes time was seven dollars per day - he was Foreman on the ditch = I left there the 30th or 31st of July - left them to work on the Kimball ditch

Statement & Testimony of W. B. Mack

Ques = What did you do on the Kimball ditch?

Objected to by the Counsel for the defence on the ground of irrelevancy

overruled, and excepted to.
The owners on the Kimball ditch- H. Kimball and Chas R Howe representing three fifths- and John Waite and Henry H. Kimball the other two fifths- we enlarged the ditch- put up flumes &c to get ready for water the next year. The Yuba River Ditch was intended to connect with the Kimball ditch and convey water from the Yuba River- continued to work on Kimball ditch until winter- Kimball ditch carries Saddle Back Creek to Eureka- worked as long as we could work on account of the Storms- we worked till November- I kept the accounts of Kimball & Howe- Those hand who were paid were paid from the proceeds of the Kimball ditch= The amount expended in 1854 was Eight hundred and nine 50/100 dollars, proceeds of Kimball Ditch. We went back the 28th of July 1855. I was among the first that went up. we took up hands. Howe was foreman- J.R. Bradford, A.J. Gray, H. Murphy, J Dudley, J.B. Gordon, J Fodman, A. McFarland, F. Johnson and several others about twenty in all we- Statement & Testimony of H.B. Mack
up to work on the ditch, we did not go up before because we could not get hands- so long as they could get water to work their claims- and that they would not work on the ditch on a years credit- could not hire men on these terms so long as there was water to work with in Eureka= water failed in Eureka about the 20th of July 1855, We prosecuted the work in 1855, to Sabastapol Creek a distance of over a mile may be a mile and a third or a mile and a half- In 1855 we past Crimea Spring, Sabastapol Spring and Sabastapol Creek, in 1855- there was expence of $ 82 94. 93/100. I kept the Books until July 1856. The Tunnel was commenced about the 1st of August 1855, and was completed in February 1856- worked in the tunnel was prosicuted both night and day- worked from both ends of the tunnel till the water drove us out from the upper end- Cost of the tunnel was about four thousand dollars- Howe surveyed the tunnel- A more accurate survey was made when we commenced the tunnel- Hands met in the center of the tunnel from

each end = Length of the tunnel is over six hundred feet- When I went along the ditch in 1855 could see the backs on the trees we had made while first running the line- I saw them again this Spring- There was thick Chapparall- had hard time running the line first and putting up the notices = In 1854, the Defendants was not there as laid down on the map- the water was turned in as the workmen would blast out the rock- Saw water in the Yuba River Ditch in 1855.- Nobody living on Sabastapol Hill Flat in 1854. Saw some of the Defendants and other Miners there in 1855 = Going from Eureka to Sabastapol you cross the piece of the upper ditch - have been along the upper line of the Divide - would cross the upper ditch in going from Eureka to Sabastapol. Trail at that time passed through the ditch - could see the ditch from the trail in 1855, on the lower grade = Worked till the 12th of October 1855, the hands in the Tunnel worked all winter - in 1856 we extended the ditch one and one fourth miles further, to a point called Bunker Hill - amount expended in 1856 was $7542.18/100. reached the Spring now in dispute about the middle of September 1855. after that I saw water running in Yuba River Ditch from that Spring. Finished the flume in the Tunnel 21st of March 1856 flume is set on timbers in the tunnel - at that time the water could be turned in to the ditch to be carried to Eureka - next water commenced in January 1857 then run about two weeks - failed, started in February again and run until August. My business at Eureka is a Ditch Agent - was from 24 to 30 inches of Water in the Sabastapol stream. The price of water at Eureka at this time was six dollars per head per day or ten dollars day and night - Eight inches in a sluice head, was ready Four sluice heads of water in the Sabastapol Creek - I was agent on Kimball and Yuba River Ditches = distance from Sabastapol to Eureka is about six miles - Howe was foreman on the Ditch - Howe was considered an owner in the Yuba River Ditch - he was compelled to sell out in

Statement & Testimony of W. B. Mack

July 1856=
Ques= Why was the work stopped on the Yuba River Ditch in 1854. at the time it was?
question objected to on the grounds of irrelevancy and calculated to mislead the Jury = overruled - and exception to
Ans= Because they were unable to prosecute the work on both ditches.
Ques= Why were they unable to prosecute the work on both ditches?
Objected to on the grounds of irrelevancy and calculated to mislead the Jury. overruled and exception to.
Ans= Because it depended upon the profits of the Kimball ditch to build the Yuba River Ditch - could not do it because they lacked the means= Kimball ditch was the only source of profit.
Ques= What was their personal condition?
Objected to as irrelevant and calculated to mislead the Jury overruled and exception to.
Ans.= Because they were so much embarrassed they would not be able to finish the work = the work on the Kimball ditch had brought them in debt.

Cross Examination.

Was first in the employ of the Kimball Ditch Company in 1854. sixth of June= that was my first work for Kimball Ditch Co - had worked for Kimball in 1853= About the first of July 1854. I first heard of the Yuba River Ditch= was east of Saddle Back at the time= Creek back of Saddle Back is always known by the Ditch Co as Saddle Back Creek. was surveying a small Ditch the 1st days of July 1854.- The matter of the Yuba River Ditch Company was in embryo at this time. Nothing had been done on this ditch to my knowledge. this was between the 1st and fourth of July 1854. more a day and a half on the Little ditch - think on the 3 or 4th of July we got the

State Testimony of W. B. Mack

the water turned in to Saddle Back Creek - went to Eureka and staid till the 10th of July then went up and commenced work on the ditch - We were on the upper ditch, dug it about sixty to eighty rods - went up with the surveyor when he made the map in Court - I never saw the upper grade through - graded to a point of ridge between the Crimea and the Alta Tunnel on the upper line - the grade of the ditch we then run - was to be the same as the other which was one inch to the rod - graded the upper line of ditch four or five days after they commenced digging - worked on the upper grade about one week. I run about forty rods of the upper grade - towards where it terminated near our camp - Dont think I swore in Court, that I never surveyed the ditch, I swore I helped set grade stakes - I swore that (in April last) if there had been a survey it was made when I was at Pine Grove - Mr Hoover said there were some very nice spring they could get by running the grade - Never saw any work done below that - Never saw Hoover do any surveying towards Monte Cristo - have heard him say he could take the water there - I have been on the ditch and pointed out the ditch dug in 1854 to the Surveyor Mr James, I wrote those Notices from dictation by Mr Hoover - think there were five of them - did not see him put them up - saw them after they were put up. It was before we commenced on the lower line that I wrote these notices - to my knowledge there had been no work or survey on that line before the notices were put up - the first notices put up by the Crimea Cabin is about fifteen feet above a level of the ditch, Second notice I saw was on a black Stub about fifty or sixty feet below the ditch - next notice was at Sebastapol Spring four rods above the ditch - next notice was Sebastapol Creek just below the bank of the ditch as built - that is as far as we went at that time, a day or two after I wrote the Notices I saw them as described - We were then running a preliminary Survey - dropped down about eighty feet

Statement
Testimony
W. B. Mack

to make this survey - dropped about fifteen feet below the tree that had the notice on - did not change the notice - Howe had a level and I had a staff about five feet in length with a cross piece on top - Sights were from five to twenty rods - paced the distance did not measure - guessed at the distance and calculated the distance - I marked a great many trees along - by hacking with an axe - I have been with a Surveyor since on the ground and pointed out the trees - pointed out two trees or Saplings to James the Surveyor - which I marked in the preliminary Survey near a big rock marked trees, I think between the black stub and big rock think I pointed them out to Mr James - Think I did point out to James a black stub, that I marked - this was the second notice Howe called my attention to it, dont know as I should have seen it if he had not pointed it out to me - Big tree below the ditch is near Pacific Cabin - pointed it out to James - I marked it. I hacked a tree or stuck a stake at the next mark - think I stuck a stake at Sabastapol Hill flat. There was thick timber on Sabastapol flat when I helped run the ditch - The nearest tree to the head of Sabastapol Spring was hacked, I went to the trees and read the Notices, recognised them the same as I had written this was in 1854, I am as positive I hacked those trees and saw the Notices in 1854, as I am that I am that I wrote them in 1854, did not see those notices since, saw my work done where the ditch crosses down to the water of Sabastapol Spring - There was no trail from Saddle Back to Eureka in 1854, except the trail to our camp. In the Spring when we first went up there in 1855, there was a blind trail from our Camp on towards Sabastapol - did not go there till 28th of July 1855 - 30th of July was the last work we done on the ditch that year - It was one year lacking two days before we went back to work again - Went to Kimball ditch when we left there in 1854, Kimball ditch

Statement Testimony of W. B. Mack

varied in width and size- Capacity of this ditch at Eureka is about twenty sluice heads- the upper portion of the ditch was larger— upper mile and a half would carry about forty sluice heads— there was one and a half miles of the ditch below that would not carry as much water as the upper one and a half miles. In the months of May and June there was fifty hands at work on the upper mile and a quarter of the Kimball ditch, this mile and a quarter came into the Saddle Back Creek, about one hundred rods from the tunnel that now comes through,— in the month of May there was from sixty to 20 hands at work they came from Eureka- there was nothing to prevent them from working at that time, on the other side there were spots where they could not work in May— four and a half or five miles from where the Yuba River Ditch strikes to Eureka— In 1854 We completed as much of the Kimball ditch as we could— We went up in July- hand could be got in other places aside from Eureka— I supposed $ 809 39/100 was all the expenses on both grades of the Ditch in 1854. Think some of the trees that was blazed were above the ditch- these notices were never changes to my Knowledge $ 809 39/100 included the amount paid to Howe for his Seven dollars per day— I dont think they could go on in 1854, with the Yuba River Ditch, had not the ability without the Cash to go on with the ditch. They could have got hands to go on with the Yuba River Ditch on a credit, but they could not have paid them— The grade of the Ditch (upper) would not have taken in the Springs. There is about three weeks or a month when the ditch is full— I saw these Stakes at the tunnel the next Sunday after they commenced work on the lower grade in 1854.

Statement Testimony of W. B. Mack

Re Direct

From November to April is so we cannot work upon the ditch — About four miles from the tunnel to Eureka — more if anything on a straight line about one mile further by the line of the ditch — The miners turned out in 1854 and worked on the ditch.

Statement & Testimony of W. B. Mack

Isaac E. James being duly sworn deposes and says. I am the Surveyor of Sierra County. I made the Survey of the Yuba River Ditch on the 23rd of March 1858. Map is a correct representation of the line of Ditch. The old Ditch is about six hundred feet in length, which runs over the divide — a grade of ditch parallel with Yuba River Ditch would run above the Sabastapol Spring — a dead level line would run about eight or ten feet below the Spring — Point A at the mouth of the Tunnel is twenty six hundred feet to the Crimea Spring — three fourths of a mile from Crimea Spring to Sabastapol Spring twenty three hundred feet to the Sabastapol Canon from Sabastapol Spring — Ditch is about three feet wide and three feet deep — grade of the Ditch from one to three inches to the rod — there is plenty of grade to carry the water — was first on the ditch was in 1856, at that time did not any blazed trees or stakes. When I made survey in 1857 for this Ditch I saw trees marked and stakes, trees upon the map represent blazed trees — blazes were small hacks on the trees, they went through the bark, — was chopped all the whole length of the ditch — saw grade stakes along the line of the ditch — did not see any other stakes, saw grade stakes at various places — could not distinguish a grade stake from any other stake, dont know as they were grade stakes 'tis my opinion they were intended for such — a preliminary survey could have been made along

Statement & Testimony of I. E. James

the line of Ditch - Chapperall would not have interfered - the blazes were small hacks on the trees - were partially grown up - looked like old blazes - cant tell when they were made - made my first observation in 1857 - each tree marked on the map represent. blazed trees

Cross Examination

The map is correct as far as it goes - first map of the survey made in 1857, was destroyed in the fire - this is substantially the same - When the line of the upper ditch was first pointed out to me Mess. Hickok & Johnson were with me - Mr Mack I think was also with us - dont remember that they pointed out the line of ditch that was run in 1854 I have no note of any amount of that ditch dug in 1854 from points A to E is about Seventeen hundred feet - the grade of the upper ditch I think, has two inches to the rod - which would be 52 9/10 feet to the mile - think two inches to the rod is the grade of that ditch - The grade of the upper ditch would carry it higher up than the point "E" a dead level line would strike about eight or ten feet below the Spring - it is not very wide at the out let of the Spring the bank varies eight or nine feet on one side of the Spring - banks at the Spring are not rocky - from the outlet of the Spring a line would take in the Pacific Spring and one by the Union Cabin - From the summit of the divide to Sebastapol Spring is less than one and one fourth miles - I am acquainted with the grade of ditches. ten feet to the mile would not be sufficient grade for a ditch to carry this water. Steeper the grade less the water will waste, the Stakes along the line in 1857 and 1858 I took for grade stakes = Over thirty miles from the Tunnel to the East Fork of the North Fork of the Yuba around by the Buttes = Mack pointed out those trees marked on the Map. at the time I made the first survey - I think Howe was not along the first survey - Where they made they survey they told me they made the survey - did

Statement
Testimony of
J. E. James

not tell me the time this preliminary survey was made – My opinion is those trees were blazed in 1855, I have examined those marks since that time – I cut out the blazes on the trees examined them – there was two rings in the wood since they were made – I think those blazes were made in 1855, – Point on the ditch marked by a rock – trees near the rock were pointed out to me as marked trees – those trees near the rock had the same appearance as to the blazes on them – two trees on the map above the ditch the blaze marks appeared the same – think there were no other marked trees – My judgment is, all the trees, those marked was done in 1855 – Think the first time I saw this County was in 1856. A level on a stick five feet high and a staff five feet high, a preliminary Survey could not be made by two or three rod sights from point "G" to the sharp crook in the ditch it is about thirty rods preliminary Survey could be made by taking long sights without cutting brush – from the three rocks to the Alma Cabin, I think the survey could not be made with short staffs without cutting brush – point above the Alma Cabin could make survey by taking short sights, by looking under the brush – I think the staff could be seen – one rod grade of the lower ditch is about one inch to the rod – guessing at the grade and guessing at the distance – with a level and staff it would not be likely to strike the point as marked on the map – between fifty and sixty feet above the ditch to the broken tree –

Statement Testimony of D. C. James

Redirect

There may be two rings grow on a tree, but never more than one. It is disputed by scientific men that this is a correct test of the age of trees, have since cut out those blazes, all but one of these blazes went into the wood – do not think it is very uncertain but that these blazes were made in 1855, every trees has rings which probably stop growing the last of July – would commence growing in the Spring – could not tell the difference between hacks made on a tree after the rings stopped growing in July and hacks made before they commenced growing the next year – hacks made one in the Spring and another in June could tell

they were both made in the same year – I cant state exactly how long sap flows in trees in the Spring – have not investigated the matter in California trees either by experience or from books this arises from my experience in other places – Along the ditch where the trees are, there is not brush enough to interfere with an accurate survey – I could run the survey the same with my instruments, – make a survey without cutting any brush

Cross Examination resumed

If the mark was made on a tree in the middle of July 1854 Statement in 1856, would show three and a half rings, one cut in 1855, Testimony of would show two and a half rings – all of these marks show D. E. James two and a half rings – I think it was the 13th of July 1856, I was there – These blazes were cut and examined by myself – Platt, Gearhart and others were with me. –

Statement Testimony of Michael Young

Michael Young being Sworn says I am acquainted with the Yuba River Ditch, believe the map is a correct representation of the ditch - have known the ditch since the 10th of July 1854, I was employed to work on the ditch by Kimball & about the 10th of July 1854, went to work on the upper line of the ditch - worked there five or six days - think there were six or seven hands at work - Howe and Mack or Moore left the Camp one day about noon, and came back in the evening. Kept at work and Howe went to Eureka that evening to see Kimball - said when he came back they were going to quit that piece of ditch and go to work on one lower down - Howe Surveyed the Tunnel that morning - cut brush and went to work on the lower ditch - dont know the exact date - Soon as enough was surveyed of the ditch we went to work on it. dont Know how far how surveyed - think James Moore was with him during this Survey - Howe left the Camp one day, either Mack or Moore was with him, were gone a half a day - he went away more than once during the Survey - Howe went the second time to Survey, had a level on a staff - the man that went with him had a staff, also a lot of stakes and an ax - think Moore went with him it was two or three days after they commenced on the lower ditch, they went up but once on the lower grade - have seen stakes stuck on the line from the Camp - Camp was near the Crimea Spring - think there were ten or twelve hands at work on the lower ditch - was up no further than the Crimea Spring in 1854. I left in about two weeks after I went up, was sick - hands were at work on the lower Grade when I left. left between the 20th and 26th of July - did not go back again to the Yuba River Ditch - When I went back to work it was on the Kimball Ditch. the hands I left on the lower ditch (Y. R. D.) were at work on the Kimball Ditch, that was about the 1st of August when I went back they were enlarging the ditch and putting in flumes - I worked two days and left again - did not go back again in 1854. was not up at all in 1855.

Size of the ditch dug on the lower grade was four feet wide at the top three feet deep and three feet wide on bottom grade was two inches to the rod— I know Mr Mack— was Cook— Kept the time of the hands and helped Mr Howe Survey—

Cross Examination

Commenced at the tunnel to work on the lower ditch— when I left one were three fourths of the distance from the tunnel to the Crimea Spring— I know nothing further of the transaction of the Company after I left the Kimball ditch in 1854— have seen Mack start out with Howe— have seen him cut brush— I have helped survey— I never saw Mack cut brush when they were making Survey— I did not see them making any Survey— Saw them take grade Stakes when they started out towards Sabastapol Spring.

Statement & Testimony of Michael Young

James Dudley

Sworn says,

I am acquainted with the Yuba River Ditch that Map is a correct representation of the line of the Ditch first became acquainted with the Ditch 18th of July 1854, went to work on the ditch about the 18th July 1854, after I went up they quit the upper grade of the ditch there might have been thirty or forty rods dug— They then surveyed the tunnel— then Howe surveyed the lower ditch— they stuck stakes one or two rods apart along the ditch. Sometimes Mack and sometimes Mr Moore was with him— the day after I went up he commenced surveying the lower ditch— used a Spirit Level and a Staff to survey with— Stakes were. Some of them split and some round sticks— dont know how far he surveyed in 1854, was at Sabastapol, I think it was in 1854. did not follow the line of the ditch— In 1855, I helped Howe stick Stakes below the Spring— think Howe was gone about half a day or how he left at the time we first dropped down— Mack kept the mens time— Quit work about the first of August we all quit work at that time and

Statement & Testimony of James Dudley

went to work on the Kinsalls Ditch – eight or ten men more at work on the lower line when we quit work – over half of the way from the Tunnel to the Cisna Spring was dug in 1854. Commenced in August 1855 to work on the ditch some of the same hands were employed in 1855, was from fifteen to twenty hands on there in 1855, went to digging the ditch ahead – was completed in 1855, up past the Sabastapol Spring – was a Cabin at Sabastapol Spring in 1855, part of the ditch opposite Sabastapol Spring was dug in September 1855, Size of the ditch is 3 feet in the bottom three feet deep and four feet wide at the top, grade I think is one inch or more to the rod – Quit work in October 1855 ditch at this time Completed to the Cannon. Saw stakes on the lower side of the ditch – threw the dirt on the lower side of the ditch Stakes near one and a half feet in length – Some of the Stakes were covered up, not all of them – found Stakes all along the ditch to Sabastapol Creek – did not see any notice Quit in October on account of the weather – worked there again in 1856 commenced work in August commenced at Sabastapol Canon worked to Bunker Hill distance is a little over a mile – about the same number of hand in 1856, there was in 1855. Saw water running acros the ditch in a Cost in 1856, worked till October. Tunnel was completed in 1856, in the Spring, never noticed the amount of water running from Sabastapol Spring – have not worked there since 1856, there was a piece of ditch left by the Sabastapol Spring in 1855 – had to blast out the rocks – water came in and prevented it.

Statement Testimony of James Dudley.

Cross Examination

Saw Stakes along the line of the ditch – Saw them grading the ditch ahead of the men that were at work.

J. R. McFarland

being duly sworn deposes and says. I have resided at Eureka since the fall of 1852, my business is ditching, Saw Yuba River Ditch in January 1855, was there at that time, crossed the divide at Saddle Back- have seen the Map before- I struck on the Ditch a short space from the tunnel- followed along the Ditch about half a mile came to the end of the ditch,- Ditch was graded two hundred yards towards Sabastapol Spring- I went farther on towards Sabastapol was looking for water to take into Eureka- I followed along within three or four hundred yards of the big Spring- I saw in places indications of a ditch, stonik, Stakes, blazes on trees & the conclusion I came to was these indications were to mark the survey of a ditch, went to see if there would be surplus water below this ditch, I went lower down the hill because I was satisfied one ditch would come lower down the hill- this was January 18th 1855- Saw stakes along the ditch which were split out- the blazes were hacked into the trees- Stakes were about twenty or thirty feet apart, at first after that they were one hundred or two hundred feet apart. Charles Bloon was with me at the time, he was my partner- The appearance of this Ditch I was on was that it had been dug the year before- the grade of the two hundred yards was graded as ditches usually are- Saw a piece of ditch dug above this, took it to be a ditch I did not go to it- Think I traveled four or five hundred yards beyond this two hundred yards that was graded.

Statement Testimony of J.R. McFarland

Cro's Examination

Think I recorded the claim I made to the water in January 18th 1855- Was there January 18th 1855 wanted to get water for the ditch of Fisk & McFarland- In 1855 this ditch ran as far as Porters Ranch- went on foot at this time to look out for water- went up on our ditch as far as Goodyears Creek- then around the North and middle forks of the North Fork

I had heard the Kimball Company were digging a ditch and from my own observation through the work had been done the year before— the grade Stakes stuck out of the ground from four to six inches— about 9 O'clock A.M. that I saw three stakes— We followed up Fick & McFarlands ditch to the head of Goodyears Creek was out one day on the ditch went to Rattle Snake Canon, Clarks Canon— the divide between the two forks which we came down to Downieville got in about 4 O'clock P.M. The grade stakes were plain to be seen— Ditch was about 3 feet wide on top about 2 feet deep— did not go up higher than the lower ditch— saw what I supposed was a ditch— saw the dirt thrown up.— Saw after the two hundred yards of ditch occasionally stakes and blazes on the trees— It was not plain to follow — within three hundred or four hundred feet I turned and went off below— ditch was dug about two feet deep— there was no snow along the line from the Tunnel to the Spring or occasionally spots of snow only— The chaparall was cut in places along the line— Think the line of Ditch is higher than Eureka or Monte Cristo— 1855 was an open winter. at that date did not see any notices along the line— about two or three weeks ago I Fick spoke about this matter— I went to my record to find out the true time.

Statement
Testimony of
J.R. McFarland

Re-Direct

Had been a great deal of rain that Winter— the ditch on the Sunny side of the hill.

J McFarland Re-called

Water in Eureka in 1855 was six dollars per day and four dollars per night. eight inches was a Sluice head, three or four sluice heads in the Sabastapol Spring & when I saw it— Starting with four heads, I dont think it would lose any in 57. the water season commenced on the 25 of January the last was in June Kimball Co sell water about one month longer than we do. James the Surveyor was living in the Cabin with Bloom when we started out the 18th of January 1855.—

Cross Examination

At least there was three sluice heads in the ditch - this amount of water would run in a wet season - would run down to Eureka -

J. N. Mullen

being Sworn

Says, I have known the Yuba River Ditch was there in July 1855 went there to take up some claims - they were at work on the ditch - I saw two ditches - the upper and the lower line - could see the ditch from bank of the upper ditch which was the trail at that time. built a cabin there worked on the ditch after I went there to within ten feet of my Cabin there was the Welch Company living on the line of the ditch at that time.

Statement Testimony of J. Mullen

Cross Examined

Worked within ten feet of my Cabin - was called the North Star Cabin it is about ten feet above the ditch, can see the old ditch from the upper line in five or six places, went there the 27th of July 1855 was when we put up our Notices - they were at work on the ditch when I went up there - I mean the ditch proper within ten feet of my Cabin -

Isaac E. James

Recalled

Says I was living in the winter of 1855 at Muggimeville was living in the Cabin with Fiske & Bloon remember of McFarland & Bloon going out to look for water, there was but little or no snow at the time they went out - think there was twenty inches of water in the Sabastapol Spring when I saw it.

Cross Examined

There was no snow at Eureka when they started out, dont remember the date - Divide at Sabastapol is about eight or nine hundred feet higher than Eureka - Snow might be very deep along the line of the Yuba River Ditch and not be any at Mugginsville - have seen the snow lay on the ground about Sabastapol a month longer than it does at Eureka - when it rains at Eureka it snows at Saddle Back.

Statement Testimony of I. E. James

F. M. Proctor

being duly sworn

says - I was Assessor in 1855. I assessed the Yuba River Ditch in that Year Assessed this property about the 10th of May 1855 the Book in Court, is a copy of the original assessment roll. Excepted to as irrelevant by Counsel for Defendants. -

Statement Testimony of F. M. Proctor

Cross Examined

Kimball gave in the property as the Yuba River Ditch dont know what property belonged to this ditch Company know nothing of this Ditch except what Kimball told me. -

R. R. Johnson,

being sworn

says— In October 1854, I was on Canon Creek=I know where the Yuba River Ditch is. I was frequently hunting around Sabastapol=was hunting there in 1854 in the fall: last of October there was a snow fell five or six inches at that time the only indications I saw was a few brush cut and a few trees marked—supposed it was a road marked out—have been there since, those marks I then saw are in the neighborhood of this ditch since built—I have resided in that vicinity since—It was one fourth or one half mile from these marks to the big Spring—The winter of 1855 I recollect was open— 10th December 1854—Snow the first of January 1855, fell at that time about eighteen inches— Snow in Spots on the 18th of January think it frequently snowed and rained in that month=think Sabastapol is about a thousand feet higher than where I was at work, have seen it storm hard on the hills and but little storm on the Creek where I live—I am not positive where the blacks on the trees were—think they were on this side of the Spring— cant locate them exactly— they may have been above the ditch—may have been below it—was over the ground about Sabastapol in 1855 was twice there in 1856. The big Spring is on this side of Sabastapol—did not go nearer to Saddle Back than Baker Flat trail—don't know as the blacks or marks are near the ditch—cant tell whether these marks were on the upper or lower ditch might be fifty or one hundred and fifty feet from one of these marks to another.

Statement & testimony of R. R. Johnson

The Counsel for the said Plaintiffs after the introduction of the foregoing evidence on their part rested their Case.

And be it remembered. after the said Plaintiffs had closed their said evidence in manner aforesaid the said defendants for the purpose of proving issue on their part introduced the following evidence. Which is the whole of the evidence introduced and relied on by the said Defendants viz: Statement

For the Defence.

Isaac E. James.

being duly sworn deposes and says. I recognise the Map in Court as being correct. The point marked A trees, I located myself. The two trees on the line of the ditch is about two hundred feet from the line these two trees had marks upon them which were made after the fire. I examined the root in question. the cut in it had the same appearance as the hacks in the trees as though they had been cut in 1855. I never knew a case where there was not one ring shown in the growth of timber. from my examination of these marks I think they were made in 1855. I went up to make a survey of this ditch for the purposes of this suit. Mack I think pointed out to me the two trees looked along the ditch above and below for marks on the trees. there are some trees above the ditch that are marked that are not on the Map. Statement Testimony of I. E. James

Cross Examined

Saw one or two trees along the line of the ditch that had been marked for notices. did not examine the trees to learn when they were. Think these marks and hacks were made about the time the timber stopped growing in 1855. Dont Know as my opinion is worth much or not on this subject. Dont Know but the sap in these trees may run all the year. Am not

Experienced in the examination of roots. never examined one before to ascertain its age – I consider my opinion in regard to this matter, is no better than any ones else –

Re direct

I have read in Scientific books the manner of the growth and development of timber – there is no guess work about my opinion that these marks were made in 1855 & have examined this matter more in Ohio than in this State – My experience has always been the same in this matter?

Statement Testimony of J. E. James

Dr Chase

being Sworn Says.

I have paid some considerable attention to Botany – I have examined Scientific works relative to this subject=

Objected to by the Counsel for Plaintiffs. –

In the growth of timber there is one ring forms yearly – I have never heard it contended that there was not one ring formed each year – I formed my observations upon my own experience and from reading on the same subject.

Statement Testimony of Dr Chase

Cross Examination

I think I could tell the time which would elapse after cutting a piece from a tree – I have never examined a large forest tree with this object in view. –

Statement Testimony of J.G. McMatten

J.G. McMatten

being sworn

says. I was in the section of County represented by Map as early as 1852. I was with Mr James on the Ditch - it was one day last week we made examination of marks on the trees along the ditch. I think we examined two trees that had been burnt. There was hacks on these trees which had been made after the fire — made examination on both sides of the ditch for marked trees. saw marked trees on both sides of the ditch — I have made examination of the growth of timber — one ring grows each year. I recollect the trees as marked on the Map — We examined the blazes on these trees — by cutting out a block by the marks. found there had two solid rings formed since these hacks were made which I think was in 1855. These hacks and blazes, I saw went through the bark into the wood — with the knowledge I have of these things I have no doubt but what these marks were made in 1855. There was one instance only on which there was any doubt that proved clear by further examination — I was above Sebastapol — examined the growth of the timber there found it the same The trees we examined were growing trees. I was at the Divide where the upper ditch is cut, in 1855 at that time I did not discover any ditch below. Can see now the lower ditch from the upper one in two places only. The tree at the end of the ditch is marked as others along the line. I have surveyed ditches. From the condition of that Country, in making a survey with a Spirit level and Staff. they would either have to cut or hold the brush before they could run the line. If a man had his distance he could guess at the grade — but guessing at the distance and grade I would think it would be more apt to be incorrect, than to be correct. From the trees that stand along the ditch there seems to be more accuracy than could be made by such a survey. Fifteen or twenty men commencing such a ditch on the first of August should complete it before winter — My Judgment is there was fourteen

in ches water in Sabastapol Spring under twelve inch head when I saw it last week - could not say as this water would reach Eureka, can only judge from our own ditch - Three heads in it will not reach us, a distance of three and a half miles. -

Cross Examined

Fourteen inches of water under twelve inches head, would be equal to eighteen or twenty inches without head - Can cut a ditch with a survey - If I had been running from the tunnel to take in the Spring, I should have made plain marks. The chaparral is not so thick from the tunnel to the first Spring as it is towards the Union and Alma Cabins - I walked along in the ditch early in the Spring of 1855, think it was in May I came to the conclusion the water was claimed When I saw this ditch I was satisfied from my own observation that they were running to high to take in the water - This ditch was dug in 1854, as I was there in the Spring of 1855. could see where I was there last week but two points on the ditch below - I formed my opinion of the growth of timber since those trees were blazed - Thus the ring formed for this year could be seen in 1857, was for more a solid ring, also one for 1856, making two solid rings and one particularly so. -

Statement Testimony of J. G. McClatchy

Redirect Examination

My opinion is these hacks could not be made in July 1854. -

J. A. Rigby

being duly sworn deposes and says, I am considerable familiar with timber in the State of Maine - I have noticed the growth of timber, in running township lines it is easy to tell from counting the rings how long a tree has been hacked -

Statement Testimony of J. A. Rigby

Thomas Passmore being duly sworn deposes and says, I was present when the survey was made from which this Map is made – These trees from where we commenced chaining were burnt, the hack were made after they had been burnt – from the indications and examinations these hacks had the appearance of having been made in 1855 – They showed two small rings – and the growth of this year – From observation I believe these hack were made in 1855. one tree two or three hundred yards from the upper end of the ditch – we saw marks on them – I believe were made in 1855. – Statement Testimony of Thos. Passmore

G. W. Fields Being duly sworn deposes and says, I once had an interest in the water in dispute in the Spring of 1855, let one of my partners have my interest – I claimed the water first myself – at that time I did not know of the claims of the Yuba River Ditch Company looked where I took up this water, could find no claims on the water, this was April or May 1855. A Dutchman, called Peter was with me when I took up the water. Wm Moore and Higgins were also claimants – I let Higgins have my interest in the water. – Statement Testimony of G. W. Fields –

Cross Examination

I claimed the water by putting a notices upon the ground, dug a ditch – did not put up any stakes – never saw any stakes or notices on the little ditch – Purport of my notice was I —— claim this water for mining purposes K. We cut the ditch along and graded by the water – I claimed the water at the same time I claimed my ground for mining – did not record my notice at the time, but a copy of the same was recorded – dont know as the dates were the same – I think I was not a member of the company when the notice was recorded – I sold to Higgins, four were in company at that time. Took up our claims and water on

the same notice- or on the same paper- took up four claims on which the Spring was situated, I wrote the first notice myself, cant tell positively as the notice on record is the same I wrote, but think it is very nearly. Statement Testimony of G.W. Fields

Redirect

I had no interest in the water when the notice was recorded

Isaac Bailey

being duly sworn deposes and says, I never had any interest in the Sabastapol claims- I was at Sabastapol and heard a conversation between Howe and Ward- a little below Sabastapol Spring this was in 1855, they were talking about the Ditch, Howe said he had surveyed the ditch. Ward said he had'nt he did not believe, because he had never seen any stakes or notices- Howe said he had not surveyed it but had sighted it through- Ward asked him where he had sighted to and he pointed up the hill- Ward then asked him why he did not follow his sight he said he dropped down to get that Spring to sell you fellows water- Ward turned to me and told me to notice it- that he would neither buy water of him, nor let that Spring run into his ditch- he was a damned old rascall- this was last of September 1855.- this conversation took place about two hundred Yards from the Little ditch- I first went there in August 1855. Statement Testimony of Isaac Bailey

Jeremiah Kilcrease

being duly sworn deposes and says, I heard a conversation between Mr Howe and Mr Ward in last of September or first of October on Sabastapol flat. They were in a dispute as I came by, Howe said he was going to run his ditch across the flat, Ward said if he did he should flume it as he had no right to run it across there during this talk they spoke about the Sabastapol Spring. Ward claimed that he had no survey, and if he (Howe) had any Stakes or survey across the flat he would not say any thing against his going across with his ditch. Howe said he had sighted it through. Howe did not show any stakes or notices, first time I went to Sabastapol was in 1854, I was there in July 1855. Gearhart & Higgins were at work there, Sluicing out a cut at that time below where the ditch now is. There was a fire at Sabastapol in the gulch, I think that was in July or August, it burnt from Sabastapol flat east. Had a conversation with Howe about taking the water to Monte Cristo, he said he talked of it but had given it up because it would cost too much

Statement Testimony of J. Kilcrease

Cross Examined

I am not friendly to Mr Kimball. have reason for being prejudiced against him. I had been to Pacific Cabin and was returning to my own Cabin. when this conversation occurred between Howe and Ward.

O. H. Gallop

being duly sworn deposes and says, there was a fire at Sabastapol flat on the last of July or first of August in 1855. the fire burnt east towards the Creek.

Statement Testimony of O. H. Gallop

Cross Examined

My opinion is there had been no fires for several years.

Mr Carver

being duly sworn deposes and says. I was at Sabastapol flat in fore part of July 1855, crossed over the divide, saw a ditch followed it as far as the line of the survey. It might have been two hundred yards, we had a Spirit level with us – When we got to the end of the ditch we ran on from there to Sabastapol, found none others aside from Defendants to appropriate this water – the next time I went up there was two men with one, In running the line from where we started would be too high – We went on the divide to see about tunnelling through to get the water lower down, and then saw the lower ditch, think about one fourth of a mile of the lower ditch was done when I saw it in 1855, we run a line from the end of this ditch to Sabastapol – we had a Staff and level to survey with – but a little ways from the end of the ditch we found stakes, we had difficulty in running through to Sabastapol, did not see any indications of a survey at that time, If there had been marks of a survey along the line that we run, I think I should have seen them – We run a level line as near as we could – have helped run ditches – The ground from the first Spring is abrupt in some places, at others level – saw no notices till I got to Sabastapol, there saw but one, on mining ground saw no notices on any water claimed

Statement Testimony of Mr Carver

Cross Examined

Did not take up the water because we found men using it. I first saw these two pieces of Ditch in July 1855, they had the appearence of having been dug last year – I got Mullen to go to Kimball and enquire if he had abandoned it. –

G. W. Keys being duly sworn deposes and says, I first went to Sabastapol with Mr Carver on the 7th day of July 1855. saw a piece of old ditch forty or sixty rods long- from the end of this ditch we run towards Sabastapol.- saw a small ditch cut the next time we went with the intention of seeing if we could tunnel- then saw another ditch further down- the first day we did not complete the survey- the next day we went back and finished- after leaving the end of this ditch, we could not find any thing that would indicate a survey- At Sabastapol we found Ward, Webber and another man- Saw no marks, hacks or notices on the trees- did not take the water because these men claimed it.-

Statement & Testimony of G. W. Keys.-

Cross Examination

The work we saw had been done on these two ditches had been done the year before

And be it further remembered that the said Defendants for the purpose of further proving the issue on their part introduced the deposition of O. S. Dodson, which was read to the jury, and in the words and figures following-to-wit;

Statement &

Deposition of O.S. Dodson

State of California }
County of Sierra } ss. District Court 14th Jud. Dist.

Harlow Kimball et al } Plaintiffs
vs.
Wm F. Gearhart et al } Defendants

On this 26th day of May AD 1858 at eight O'clock P.M. Personally appeared O.S. Dodson, a witness on part of the Defendants herein, also at the same time personally appeared Keasey D. Thornton Jr. Counsel for Plaintiffs and Wm M. Stewart Attorney for Defendants, and the said O.S. Dodson being by me William Campbell a Notary Public in and for said County, duly sworn deposes and says:— Statement Deposition of O.S. Dodson

Question= What is your profession?
Answer= Surveying.
Ques= Are you accustomed to running the grade of ditches?
Ans= I am.
Ques= Do You know the parties to this action?
Ans= I know some of them.
Ques= Were you ever employed by the Defendants to make a survey for them, if so, when, where, and what?
Ans= I was employed to make a survey of a ditch or ditches at Sabastapol in 1857.
Ques= Did you make a plat of that survey?
Ans= I did.
The Witness was here shown a Map Marked "A" and said that said Map was the one he made.—
Ques= What does "B" represent on said map?
Ans= Kimballs Yuta River Ditch.
Ques= What does a b in italics represent?
Ans= A section of a ditch, pointed out to me in 1857 on the 23rd of November by a man named Keys, as being portion of the ditch

"B" that was dug in 1854.
Ques. = What distance is it from "b" in italics to Sabastapol Creek?
Ans. = About one mile.
Ques. = What is the length of the section of the ditch "a b" in italics?
Ans. = About eighty rods.
Ques. = How far is it from Sabastapol Creek to upper end of ditch "B"?
Ans. = About a mile and a half or nearly so.
Ques. = What does "C D" represent?
Ans. = It represents a short ditch commencing on the divide between little Canon and the North Fork of the North Yuba and running up the side of the divide adoining the North Fork seven hundred and seventy feet.
Ques. = What does C E represent?
Ans. = The continuation of what would be the grade D C continued. Statement Deposition of O.S. Dodson
Ques. = Are the names of places and Streams on the map correct?
Ans. = I believe they are entirely correct.
Ques. = What does F C and H represent?
Ans. = Small Streams running into the west branch of the North Fork.
Ques. = What does the large dark line on the upper part of the Map represent?
Ans. = The divide between the waters of Canon Creek and those of the North Fork of the North Yuba.
Ques. = Did you ever make any survey at Sabastapol besides the one before mentioned?
Ans. = I have.
Ques. = When, and what was it?
Ans. = In August 1855, of Mining claims for the Alma and Union Companies.
Ques. = At that time did you pass along ditch B?
Ans. = I did pass along a portion of ditch B. from "b" in italics

to Pacific Ravine.
Ques = How far up was ditch B extended at that time?
Ans = It was extended to Pacific Ravine.
Ques = Were any men at work on ditch B at that time?
Ans = Yes there were eight or twelve men at work on it.
Ques = What were they doing?
Ans = Digging and shoveling, the ordinary business of ditch making.
Ques = Did you have any conversation with them?
Ans = I did with some of them.
Ques = What was the subject of the conversation?
Question objected to by Plaintiffs Attorney because the same is irrelevant, and not admissible as evidence in this suit it not being shown that the conversation was with any of the Plaintiffs.
Ans = We talked about the surveying of ditch B
Ques = What did they tell you about the surveying of ditch B?
Same objection by Plaintiffs Counsel as above set forth to previous question.
Ans = That it had not been surveyed beyond where they were that it had been surveyed so far by themselves and they thought they could finish it or rather "himself" the man who was speaking to me, this man was also acting as Superintendant— I mean by "so far" as far as it was dug to Pacific Ravine.
Ques = Can you give, an estimate of the distance from where ditch B crosses the divide at the point marked "Tunnel" to to the Buttes on the grade of the ditch?
Objected to Plaintiffs Counsel on the ground of irrelevancy.
Ans = The distance would be very difficult to estimate from the roughness of the country, but I think not less than thirty five, nor over sixty miles.
Ques = What is the depth, and width of ditch B?
Ans = I have not measured it but from observation think it is four feet wide, and two feet deep.
Ques = What is the character of soil as to the feasability of digging a ditch from "A" in Italics to Sabastapol Creek?

Statement
Deposition of
O. S. Dodson

Ans.— The soil is somewhat rocky, not remarkably hard to dig, but the soil is covered with a thick growth of Oak apparell

Quest.— Did you ever have any conversation with Kimball one of the Plaintiffs in reference to the Survey of ditch B?

Ans.— I had a conversation with Kimball about surveying a ditch somewhere in the neighborhood, that is on some of the forks of the North Yuba, this conversation was in 1855 but I am not positive.

The foregoing question and answer was objected to by Plaintiffs Counsel on the ground of being irrelevant.

Quest.— State the circumstances?

Objected to by Plaintiffs Counsel on the ground of being irrelevant.

Ans.— We met on the road, and I think it must have been in the Winter of 1854 and 1855, I am pretty certain it was in 1855, the Kimball, asked me as to the practicability of bringing the branches of the North Fork into Eureka and the probable cost per mile— I had more than one conversation with him on the same subject— I had a conversation with Davidson of Eureka on the same subject, but I think he had no conversation with Kimball. I think the last conversation with Kimball was in May 1855— in these conversations we were talking about the practicability of bringing the water of the forks into Eureka and the cost of doing so, this was the subject of our conversation. I dont remember the language—

Statement Deposition of O.S. Dodson

Plaintiffs Counsel desired to ask no questions on Cross Examination.—

(Signed) O.S. Dodson

Sworn & Subscribed before me this 26th day of May 1858

State of California } ss
County of Sierra }

I, William Campbell a Notary Public in and for Sierra County State aforesaid hereby certify that the foregoing is the deposition of O.S. Dodson a witness on

Certificate

the part of the Defendants as taken down by me at the office of Stewart & Van Clief in the Town of Mooresville County aforesaid on the 26th day of May A.D. 1858 between the hours of eight o'clock P.M. and ten P.M. of that day in the presence of the respective Counsel for the parties, and that the said deposition was by me read to the said witness and the same corrected by him in every desired particular and he thereupon subscribed his name thereto in my presence. Statement Certificate

In witness whereof I have hereunto set my hand and affixed my seal Notarial on this 26th day of May A.D. 1858

Will Campbell
Notary Public

Seal Notarial

And thereupon the said Defendants rested and the evidence on the part of Plaintiffs and Defendants being concluded, the Counsel for said parties proceeded to sum up the same before the said jury— Statement

And be it further remembered that the said District Court at the request of the Counsel for the said Plaintiffs instructed the jury as follows, viz:—

No 1

"If the jury believe that the Plaintiffs did in July 1854 project "a ditch to receive the water now in dispute, and did give notice to "the world of their intention to dig such ditch and appropriate "such water in the usual manner, and did mark out and designate the line of said ditch by the usual marks and indications and "did pursue their work on said ditch with a reasonable degree of "diligence until the same was completed so as to receive this water "in dispute — then they are entitled to such water before all persons "subsequently claiming or locating it. Instructions

No 2

"If the Jury believe from the evidence, and from the admissions
"contained in the answer, that the Plaintiffs took up and claimed
"the water in dispute before the Defendants did, and that they con-
"structed a ditch to receive such water with due dilligence and
"that since the completion of such ditch, they have been deprived of
"such water by the defendants, and since the 31st of July 1856 the
"Plaintiffs have had their ditch in a condition to, and could
"have used the water in the water season prior to the commencement
"of this suit, and have during such time been deprived of the use
"thereof by the defendants- then they must finds for the Plaintiffs,
"and assess the damages." Statement

No 3

"In appropriating unclaimed water on Public lands, only
"such acts are necessary, and only such indications and evidences
"of appropriation are required, as the nature of the case and the
"face of the country will admit of, and are under the circumsta-
"nces and at the time practicable – and Surveys, Notices, stakes and
"blazing of trees followed by work, and actual labour without
"any abandonment will in every case where the work is completed
"give title to water over a subsequent claimant" Statement Instructions

No 4

"If the Plaintiffs surveyed the ground, planted stakes along
"the line gave public notice by posting notices or otherwise, and
"actually commenced, and diligently pursued the work of
"the Yuba River Ditch was to take and receive the water in dis-
"pute, and if any of these acts were prior to the claim or location
"of Defendants, this entitled Plaintiffs to the possession and
"ownership of the water, and therefore the Jury must find for
Plaintiffs.– Statement Instruction

No 5

"If the Jury believe that the Plaintiffs, with the intention "to appropriate this water, and used reasonable diligence in fol- "lowing one step by another till the ditch was completed, their "title to the water though it was not perfected until the ditch was "so far completed as to convey water- will get on completion date "from the beginning of the work".—

No 6

"That in determining the question of the Plaintiffs dili- "gence, in the construction of their ditch - the Jury have a right "to take into consideration the circumstances surrounding "them at the date of their alleged appropriation, such as the nature "and climate of the country traversed by said ditch, together "with all the difficulties of procuring labor and material neces- "sary in such cases".— Statement Instructions

No 10

"The Law does not require a vain or useless thing to be done, "that therefore the Plaintiffs were not required by the law of due "diligence, to complete their ditch, before they could successfully "use it for the purpose for which they dug it".—

No 11.

"If the Tunnel through the ridge was a necessary part "of the Plaintiffs ditch, without which it could not be used, then "it was only necessary for the said Plaintiffs to complete their "said ditch, by the time they could with reasonable diligence "succeed in preparing their tunnel for use."

To the giving of each of which said instruc- tions, the Counsel for the said Defendants then and there duly excepted. Defendants Exceptions

And the Counsel for the said Plaintiffs also requested the said District Court to instruct the said Jury as follows, to wit:

No 7

"If the Plaintiff did in the Summer of 1854, acquire "any right to the water now in dispute, then the Law presumes "they obtained the right so by them acquired, and the burthen "of proving an abandonment on their part is with the De- fendants."—

No 8

"That the Defendants are confined to the defence set up "their answer, and cannot rely on matters not pleaded by them "to defeat this action.—

"And therefore, if the Defendants in their "answer rely exclusively upon priority of location and appropri- "ation as a defence to plaintiffs action, they must now be con- "fined to such defence."—

Statement
Instructions
refused

No 9

"If the Defendants rely on an abandonment by the Plain- "tiffs, they must aver it in their answer and establish it by their "evidence."—

Which said instructions, the said District Court then and there refused to give, as requested by the Counsel of said Plaintiffs— alleging as the ground of his refusal the following, viz:—

"The 7th 8th and 9th of Plaintiffs instructions "were refused— there is no testimony showing that in 1854 the "Plaintiffs had completed their ditch to the water in dispute "so as to give them a right to it— the doctrine of relation was fully "explained to the Jury and the issues made by the Pleadings."—

To which said refusal, by the said Court the Counsel for the said Plaintiffs, then and there, in due form of law excepted, and insisted before the said Court that the said instructions were according to the law of the land, and that the same aught by law to be given. Exceptions

And be it further remembered that the said District Court, at the request of Counsel for the Defendants then and there instructed the said Jury as follows, - Viz; — Statement

1st

"If the Jury believe from the evidence that the Plaintiffs "had no ditch or survey for a ditch to the Stream of water in "dispute, and also that they had no notice or marks upon said "stream indicating an intention to appropriate it, at the time "of Defendants appropriation of the water of the said Stream, "they must find for the Defendants." —

2nd

"Possession or actual appropriation must be the test of priority in all claims to the use of water, whenever such claims are "dependant upon the ownership of the land through which "the water flows." — Instructions of Defendants

3rd

"The mere act of commencing a ditch with the intention "of appropriating the water of a stream, is not sufficient of itself "to give a party any exclusive right to the water of such stream." —

4th

"Although Plaintiffs or their grantors may have intended "to appropriate the water in dispute by means of their ditch "commenced in 1854, yet if they did not manifest their intention by such acts or in such a manner, as would have notified "prudent men about to appropriate said water of such intention

"at the time Defendants appropriated the same, the Jury must find
"for the Defendants."—

5th

"The doctrine of relation in the appropriation of water
"can only apply, when the first acts from which the party appro-
"priating seeks to date his right, indicate the intention of appro-
"priating such water."—

6th

"If the Jury believe from the evidence that Plaintiffs
"or their predecessors in interest did not after locating and sur-
"veying their ditch, prosecute the work upon it in good faith,
"and as fast as the nature of the work and the state of the weather
"would reasonably permit and that they had neglected to work
"upon it for an unreasonable length of time immediately proce-
"ding the appropriation of the water in dispute by Defendants,
"the verdict should be for the defendants."—

Instructions of Defendants

Statement

7th

"If the Jury believe from the evidence, that Plaintiffs at the
"time they commenced the Yuba River Ditch had not the pecu-
"niary means requisite to complete the same in a reasonable
"time and that they projected the said work and claimed the water
"in dispute with a full knowledge of their said pecuniary inabil-
"ity to complete the same within a reasonable time, then Plain-
"tiffs cannot urge such want of pecuniary means as an excuse
"for not prosecuting said work with reasonable diligence and com-
"pleting it within a reasonable time."—

8th

"If the Jury believe from the evidence that the Plaintiffs
"made an unreasonable delay after claiming the water in dispute
"and that during such delay, and before Plaintiffs renewed work upon their
"ditch, Defendants in good faith located and appropriated the water

"in dispute, they must find for Defendants."—

9th

"If the Jury believe from the evidence that the defendants were "the first appropriators of the water in dispute in good faith and "without notice of any prior claim of Plaintiffs, they must find "for Defendants."—

10th

"Even if Plaintiffs had located and claimed the "water in dispute in the year 1854 and prior to the appropriation "of the same by Defendants, yet if after making such location "and claim, Plaintiffs failed and neglected to renew or keep "in existance such notices, or such other evidences of their lo- "cation and claim as would have put a reasonable and pru- "dent man wishing to appropriate the same water on enquir- "ing, and that in the absence of such notices or other evidences "of said location or claim the Defendants located and appro- "priated said water in good faith for mining purposes, they "must find for defendants."— Statement Instructions of Defendants

11th

"Kimball and others are Plaintiffs in this action and "they must show a better title to the water in dispute than the De- "fendants have, before they can recover and the burthen of proof "is on the Plaintiffs to show that they are entitled to the water in "dispute."—

To the giving of each of which said instruc- tions the Counsel for the said Plaintiffs then and there objected and insisted that by the law of the land, the same ought not to be given; but the said District Court having disregarded their said objection and given the said instructions as afore- said the Counsel for said Plaintiffs then and there in due form of law excepted.— Exceptions

And be it further remembered that on to wit: the 25th day of July A.D. 1858. the said cause having been submitted to the Jury therein, they retired to deliberate of their verdict And afterwards, to wit the day and year last above mentioned the said Jury returned into Court a verdict for the said Defendants.—

And because the matters and things herein contained and set forth do not appear by the record of the proceedings in said cause— this Statement containing the same has been made, and the Hon. Niles Searls District Judge as aforesaid, has in accordance with the prayer of the Counsel for the said Plaintiffs, settled and signed the same in due form as prescribed by law.———— Statement

The foregoing Statement is correct, and the same was settled and signed by me— this the 26th day of July A.D. 1858.————

Niles Searls
Dist. Judge

Affidavit on motion for new Trial

District Court 14th Judicial District. State of California
County of Sierra.

Harlow Kimball et als }
vs }
Wm F. Gearhart et als }

Harry S. Thornton Jr. being duly sworn deposes and says, that when the above case came on to be tried at the April Term of this Court 1858, and was called for Trial the Counsel for Plaintiffs moved to amend Complaint by remitting and throwing all Claim for damages prior to the 18th day of July 1856, claimed in the complaint. That said motion was granted as appears from the minutes of the Court and the Statement for a new trial herein - That thereafter almost immediately one Chas. R. Howe a most material witness for Plaintiffs was called and sworn and testified. That he was examined on his voir Dire as to interest most fully by Defendants Counsel. That then the deed from said Howe to Kimball one of these Plaintiffs was offered in evidence and no objection was made to his testimony on the ground that this deed bore date the 19th of July 1856. That said trial proceeded and no verdict was had therein the Jury failing to agree. That subsequently and before the next Term of the District Court, it became necessary and proper under the Statute to take the Deposition of said Howe and that it was taken as appears from the Statement herein = That after the same was taken and at the next Term of the Court the case came on to be tried and it was proved that said witness was absent from the County of Sierra = That then his Deposition was offered and defendants Counsel made a motion to suppress the same among others on the ground that damages were claimed to the 18th of July 1856 and that Howe was interested his deed bearing date the 19th of July 1856. This affiant was taken by surprise at the said discovery then for the first time made of this fact and when it was too late to remedy the matter on account of the absence of the said witness.

Affidavit of H. S. Thornton Jr

Subscribed & Sworn to. }

Sworn

before me this 26th day of July 1858.
Ralph Ellis
Clerk D.C.

Affidavit

Stipulation

We Hereby Stipulate and agree that the foregoing affidavit being the same used on the motion for a new trial, may be embodied in the record in said cause, and taken into consideration by the Supreme Court, without the necessity of embodying the same in a statement on Appeal. ——
July 26th 1858.

Alonzo Platt and
Vanderlip & Stewart
Attys for Defts

Thornton
and J. R. McConnell
Attys for Plffs

Motion for New Trial

State of California }
County of Sierra }

District Court 14th
Judicial District

Harlow Kimball and others }
vs }
William Gearhart and others }

Now comes the Plaintiffs in the above entitled cause and move the Court that the verdict heretofore rendered in said cause be set aside, and annulled, and that a new trial be granted by the Court therein upon the following grounds viz:

1st Surprise which ordinary prudence on the Motion for
part of said Plaintiffs could not have guarded against. New Trial

2nd Newly discovered testimony material for the said Plaintiffs which they could not with reasonable diligence have discovered, and produced at the trial.—

3rd Insufficiency of the evidence before the jury to justify the verdict so rendered by them.—

4th Error in Law occurring at the trial and there and then duly excepted to by the said Plaintiffs.—

5th The said Verdict is contrary to the law, and the evidence.—

H. S. Thornton and
J. R. McConnell
Attys for Plffs.—

To Messrs Platt & Clark
Vanclief & Stewart
Attys for Defts

You will please take Notice that the Plaintiffs are about to make the foregoing motion to set aside the verdict rendered in said cause, and that a new trial of the same be granted.— You will also take Notice that the said motion will be heard upon a statement and affidavit to be hereafter filed in due time as required by law. — Notice of Motion for New Trial

H. S. Thornton Jr
& J. R. McConnell
Attys for Plaintiffs

District Court 14th
Judicial District

Harlow Kimball, and others }
vs }
William F. Gearhart and others }

To the Clerk of the said District Court and Messrs Platt and Vanclief & Stewart attorneys for the Defendants.— You will please take notice, that the Plaintiffs in the above entitled cause do hereby appeal to the Supreme Court from the final judgment rendered in said cause and also from the order of the said District Court overrulin the motion for a new trial. — Notice of Appeal

H. S. Thornton Jr
and J. R. McConnell
Attys for Plffs

Undertaking on Appeal

In the District Court of the 14th Judicial District. County of Sierra. State of California.

Harlow Kimball et als. Plaintiffs
vs
Wm F. Gearhart et als. Defendants

Whereas, the Plaintiffs in this action above named, are about to appeal to the Supreme Court of the State of California, from a judgment made and entered against them in said action in the said District Court, in favor of the above named defendants on the 26th day of July A.D. 1858 for dollars costs. Now Therefore, in consideration of the premises, and of such appeal, We, the undersigned, William Fisk, a Ditch owner of the County of Sierra and C.R. Hopkin, a Cattle Dealer of the same place, do hereby jointly and severally undertake and promise, on the part of the Appellants, that the said Appellants will pay all damages and costs which may be awarded against them on the Appeal, not exceeding three hundred dollars, to which amount we acknowledge ourselves, jointly and severally bound. Undertaking on Appeal

And whereas the Appellants are desirous of staying the execution of the said judgment so appealed from. We do further, in consideration thereof, and of the premises jointly and severally, undertake and promise, and do acknowledge ourselves further jointly and severally bound in the further sum of Twelve thousand 7/100 dollars, (being double the amount named in the said judgment) that if the said judgment appealed from, or any part thereof be affirmed, the appellants shall pay the amount directed to be paid thereby, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages and costs which shall be awarded against the Appellants upon the Appeal.

Dated this eleventh day of August A.D. 1858.

Wm Fisk (Seal)
C.R. Hopkin (Seal)

State of California }
County of Siena } ss

William Fisk and C. R. Hopkin the persons named in and who subscribed the foregoing Undertaking as the sureties thereto, being severally duly sworn say, and each for himself deposes and says:— That he is worth the amount to specified in said Undertaking as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution. Jurat

Wm Fisk
C. R. Hopkin

Subscribed and Sworn to before me, }
this 11th day of August A.D. 1858 }

Jerome J. Totten
Justice of the Peace
Town: No 4.
Siena Co Cal

It is consented to by Defendants Counsel that the within Undertaking on appeal be this day filed and the said Undertaking is hereby approved, and the sureties thereon are sufficient and no exceptions to the time of filing will be taken. Agreement

August 12th 1858.

Wm M. Stewart
Counsel for Defts

State of California
County of Sierra

I Ralph Ellis Clerk of the 14th Dist Court in & for the County of Sierra hereby Certify that the within and foregoing is a true full and Correct Copy of all papers. Orders of Court, Testimony &c required to be Sent to the Supreme Court of the State of California on Appeal in the above entitled Cause and now remaining of record and on file in my office.

In Testimony Whereof I have hereto Set my hand and the Seal of the 14th Dist Court this 14th day of August A D 1858

Ralph Ellis Clerk DC
By Geo E Tallmadge Deputy